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2965-

No. 15,052

United States Court of Appeals
For the Ninth Circuit

See Vol. 2964

EMPIRE PRINTING COMPANY,
a corporation,

Appellant,

vs.

HENRY RODEN, et al.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLANT.

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FILED

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PAUL P. O'BRIEN, CLERK

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Appellees.

Upon Appeal from the District Court for the
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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The three actions of Henry Roden, Ernest Gruening and Frank A. Metcalf, plaintiffs, v. Empire Printing Company, a corporation, were consolidated for trial by the District Court, Territory of Alaska, Division No. 1. (R. 54.) The original complaints were filed October 1, 1952. The actions were founded on alleged libel charge against the appellant Empire Printing Company, and the cases as consolidated were tried before a jury at Ketchikan, Alaska, November 14-19, 1955. A motion for directed verdict was made by defendant in writing, argued and denied. The jury rendered its

verdict on November 21 in favor of appellees, awarding to each the sum of \$1.00 compensatory damages and \$5,000.00 punitive damages (R. 118-9.) The judgment was entered December 7, 1955. A motion for new trial or for judgment notwithstanding the verdict was denied. (R. 129-131.) The appeal was taken from the judgment by filing notice of appeal on December 7, 1955.

Jurisdiction of the District Court rests upon the Act of June 6, 1900; 31 Stat. 322, as amended; 48 U.S.C.A. sec. 101; and the jurisdiction of this Court on Section 1291 of the New Federal Judicial Code.

STATEMENT OF THE CASE.

The actions arose out of publication by defendant in its daily newspaper published at Juneau, Alaska, of a news article and editorial in which an account was given of the handling of certain public moneys and with comments and opinions of the reporter who wrote the news story and the editorial. These appeared in the issue of appellant's paper of September 25, 1952. The appellees also complained of a headline in the same issue entitled "REEVE RAPS GRAFT, CORRUPTION", and it appeared on the same page of the paper as the news story and editorial complained of, although there was no mention of either of the appellees in the Reeve headline or the article beneath it and of which it was the caption and no mention of anything involved in these actions. (Pltff's Ex. 1.)

The publications complained of, referred to in the amended complaints, are contained in Plaintiff's Exhibit 1, which is a copy of the newspaper published by appellant on September 25, 1952. Copies of the articles complained of are attached to the defendant's answers to the amended complaints as exhibits thereto. (R. 26-37.)

At the time of the publication involved the appellee Ernest Gruening was Governor of Alaska, Henry Roden was Treasurer, and Frank A. Metcalf was Highway Engineer. These three under the laws of the Territory constituted the Territorial Board of Road Commissioners. This Board under the law had certain jurisdiction and certain duties imposed upon it in connection with the construction and maintenance of roads, harbors, and harbor facilities. (See Secs. 41-2-1 and 41-2-2, A.C.L.A. 1949.) There appears no authority in the law for the purchase or operation of a ferry.

The appellees in 1951 purchased a ferry boat called the "*Chilkoot*" with funds of the territory, and had operated it during the season of 1951 between Juneau and Haines, Alaska. Apparently the purchase of the ferry and certain repairs made were defrayed out of a special fund under the control of the Highway Engineer known as the Motor Fuel Tax Fund (48-5-2, A.C.L.A. 1949), and it seems that the vessel was operated in 1951 through the use of this fund.

On June 5, 1952, the board met and decided to operate the ferry "as a private enterprise" with the

purser meeting some of the expenses out of the receipts rather than turning the money back into the general fund of the treasury. (Plaintiffs' Exhibit 9, not printed.) Thereafter one Robert E. Coughlin, who was then purser of the Chilkoot, was authorized to handle the receipts and disbursements of all funds in connection with the operation of the ferry, and he set up a bank account in the B. M. Behrends Bank at Juneau entitled "Chilkoot Ferry", and he was the only one authorized to handle that account and to issue checks against it. (R. 353, 369, 384, 409.) The salaries involved were paid in the regular manner on vouchers approved by the Auditor of Alaska, who was then Mr. Neil Moore. (R. 276-278.) All other disbursements were made and all other expenses paid by the purser Coughlin, who was selected to handle the fund by appellee Metcalf with the approval of the other appellees, who were members of the Board of Road Commissioners. (R. 353.)

On or about August 20, 1952, a check was issued on this Chilkoot Ferry fund by Purser Coughlin to Steve Homer, who was then employed on the ferry. He took this check to Neil Moore, the Auditor, and Neil Moore thereupon called the matter to the attention of the Attorney General, and Moore and John Diamond, Assistant Attorney General, went to the bank and closed the fund. (R. 282.) Homer later on suggested to Jack Daum, a reporter for the appellant, that there was something wrong with the ferry fund and suggested that he see the Auditor and get particulars. (R. 460, 461, 524.)

On September 25, 1952, the appellant in its newspaper published the articles complained of, giving Neil Moore, Auditor, as their authority for the facts and quoting in full a letter from Moore to the Attorney General regarding the ferry fund. (R. 30, 31, and Plaintiffs' Exhibit 1, not printed.)

A short time thereafter the libel suits were filed against the Empire Printing Company by the three appellees. These suits are almost identical, and the questions of fact and issues of law involved are the same excepting in one particular as to appellee Metcalf, which will be referred to later on.

In the amended complaints the plaintiffs alleged that they constituted the Alaska Board of Road Commissioners and they operated the ferry Chilkoot and paid the costs in part from the revenues received. It is alleged that the articles complained of, both the news item and the editorial, draw a parallel between the setting up and operation of the Chilkoot Ferry fund and the case of Oscar Olson, a former territorial treasurer who was indicted for the crime of embezzlement and sentenced to serve a term in the penitentiary. The amended complaints alleged that the publications complained of were malicious and intended to convey to the entire community that appellees were dishonest and corrupt and guilty of embezzlement and of converting funds of the territory to their own use in violation of law, and that the publications were the culmination of a campaign of falsehood, misrepresentation and calumny intended to disgrace appellees and their assistants in the administration of the affairs of

the territory. Plaintiff Gruening prayed for damages in the sum of \$200,000, one-half of which was alleged to be compensatory damages and one-half sought as punitive damages; appellee Roden sued for \$100,000, dividing his equally between compensatory and punitive damages. (R. 7.) Appellee Metcalf, while making the same allegations in his complaint as the others, did not in the prayer of his complaint ask for any division of the amount sued for into compensatory and punitive damages; he simply sued for \$100,000 damages. (R. 17.)

The appellant in its answers to the amended complaints admitted certain of the facts alleged such as the residence of plaintiffs, that they constituted the Board of Road Commissioners, that the appellant published the paper, that the appellees purchased the Chilkoot Ferry and operated it, and that Oscar Olson, former territorial treasurer, was convicted of embezzlement and sentenced to the penitentiary. It admits the publication but denies that it was false, scandalous, defamatory or libelous, or that it was intended to convey information that appellees had converted funds of the territory to their own use; denies that there was any campaign of calumny, falsehood or misrepresentation and denies that appellees' reputations were injured. It sets up three affirmative defenses, pleading the truth of the facts stated in the articles, and that these facts were all on record in the office of the Auditor; that the opinions in the publication were fair comment and privileged criticism based on facts. It alleges that it is the duty of the newspaper to inform the public of all acts of public of-

ficials and further alleges that through the handling of the ferry fund there was a substantial loss of public funds; that the appellees were all public officials, two of whom were elective and the other one appointive; that all matters stated in the publications were of public concern, the opinions expressed were justified, and that all facts were available to the public, and that the opinions were not expressed for the purpose of causing harm to anyone and dealt only with the public conduct of public officials. (R. 18-53.)

The amended answers also alleged that Roden and Metcalf were interviewed before the articles were published and their explanations were published on the same page as the offending articles. It is further alleged in the third affirmative defense that on the following day an explanation was published on the front page of the newspaper issue of that day explaining that there was no charge in the article that the appellees had actually stolen any funds or converted any to their own personal use. (R. 25, 37.)

In connection with the pleadings and Appellees' Exhibit 1, it will be seen that the parallel mentioned to the Oscar Olson case was "in the receipt and disbursement of public funds".

It will be helpful to the court at this point to call attention to the statutes of Alaska involved in this case and which were so frequently discussed during the trial.

Section 12-2-1, A.C.L.A. 1949, reads as follows:

"Every office, board, commission or bureau authorized to collect or receive any fees, licenses,

taxes or other money, and every office, commission or bureau of the United States or other authorized agency, authorized to collect any fees, licenses, taxes or other money, belonging to this Territory, shall account for and pay such fees, licenses, taxes or other money, less any fees he may be entitled to under existing law, to the Territorial Treasurer at least once each month and the same shall be covered into the general fund.”

Section 12-3-1 reads:

“Disbursing officers of the Territory of Alaska shall (1) disburse moneys only upon, and in strict accordance with, vouchers duly certified by the head of the department, establishment, or agency concerned, or by an officer or employee thereof duly authorized in writing by such head to certify such vouchers; (2) make such examination of vouchers as may be necessary to ascertain whether they are in proper form, duly certified and approved, and correctly computed on the basis of the facts certified; and (3) be held accountable accordingly.”

These are the statutes which deal with the duty of every person, board and commission in the matter of the receipt and disposal of public funds of every nature.

In 1951 the Alaska Legislature passed Chapter 133 S.L.A. 1951, the provisions of which superceded some of the provisions of the former law including section 12-2-1. Section 14 of that act provides as follows:

“All receipts from any source whatever shall be forwarded to the Territorial Treasurer each day

or as promptly as practicable, and at the same time a report of all receipts since the last previous report and of the disposition thereof shall be submitted to the Commissioner of Finance by the depositing agency.”

The Attorney General in an informal offhand opinion held that Chapter 133, S.L.A. 1951, was invalid; and it was never put into operation, but the distinction between these provisions and those of section 12-2-1, A.C.L.A. 1949, are actually immaterial to this case, for both provide that all funds received by any person for the territory or in which the territory has an interest shall be deposited with the treasurer.

The trial court in its instructions to the jury refers to both the provisions of the Alaska Compiled Laws Annotated and those of Chapter 133, S.L.A. 1951, and he states that these are substantially the same. (R. 103.)

Section 65-5-63, A.C.L.A. 1949, reads as follows:

“Embezzlement of Public Money. That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town, or corporation or in which said Territory, county, town, or corporation, has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be

deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be.”

This is the section under which Oscar Olson, former treasurer, was sentenced. (R. 102.)

It is well to bear in mind that while Olson was convicted of actually converting territorial funds to his own use, (Defts. Ex. “J” and Appendix A), he was sentenced under the last quoted section which makes it a crime for any person to either convert to his own use public funds, loan them with or without interest, or “neglect or refuse” to pay them over as by law directed or required. The appellant throughout the trial insisted that the parallel to the Olson case consisted in setting up the same device for the handling of territorial funds in both cases. (Testimony of Neil Moore, R. 283, 295-299.) In the Olson case the funds were converted to his own use, while in this case the appellant contends the funds were not turned over to the territory or the general fund of the territory as the law requires, and they were lent to a bank when the special ferry fund was set up. They were entrusted to an unauthorized person, namely, the purser of the ferry boat Chilkoot, who was not required to furnish a bond. (R. 423.)

The appellant alleged in its answers and offered to prove that a substantial portion of the public funds so going through this very account had been lost irre-

trievably. This evidence was rejected by the court. (R. 105, 606-616.)

The record in this case is rather long, much of the testimony deals with the question of malice and many pages of it are argumentative and the expression of opinions of the witnesses. The instructions are lengthy and the appellants' proposed instructions, most of which were denied, consisted of many pages, so for the sake of the convenience of the court, we shall not attempt to set them forth verbatim, but will call attention to the pages of the record where they are found and to the objections made to them, the court's rulings thereon, and the exceptions taken.

Appellants' specifications of error and points to be relied upon in this appeal are 21 in number, but for the sake of convenience and in order to avoid too long a brief, we shall attempt to group the arguments under a few headings. Several specifications may be included under each of the several headings. Appellant contended throughout the trial and now urges that the court was in error in holding and ruling as follows:

1. That the published articles were libelous per se;
2. That the appellees committed no crime and no offense involving criminal punishment;
3. That in order to be guilty of violation of the law as charged in the articles, it must be shown that the appellees actually converted territorial funds to their own use;
4. That the criminal acts of an agent, even though illegally appointed, is not to be attributed to the principals;

5. That the law presumes the publications were made maliciously, and that this arises from the publication itself;

6. That the truth of a publication is no defense unless known at the time;

7. That the evidence regarding loss of public funds which appellant offered and which was rejected was immaterial and inadmissible;

8. That the jury might take into consideration the headline referring to "Reeve Raps Graft, Corruption".

9. That the checks which were issued on the ferry fund by Robert E. Coughlin to disburse public moneys were not material and their disappearance and loss and nonproduction after demand was immaterial;

10. That the deposit of money in a bank in a checking account does not constitute a loan within the meaning of the statute;

11. In admitting into evidence the Fred McGinnis letter. (Plaintiffs' Exhibit 8, R. 186.)

SPECIFICATIONS OF ERROR.

1. The court erred in holding and ruling, and instructing the jury, that since 12-2-1, A.C.L.A. 1949, did not provide any criminal penalty for its violation and that therefore plaintiffs could not lawfully have been charged with any criminal act for violation of that section, no testimony could be introduced to show that any loss of public funds had occurred through appellees' violation of section 12-2-1. (R. 102, 104, 105, 606-616.)

2. The court erred in rejecting the testimony of Steve Homer under appellant's offer of proof and which testimony was offered to show a loss of public funds and which loss resulted ^{from} ~~in~~ a violation by appellees of section 12-2-1, A.C.L.A. 1949; and in rejecting all other testimony of appellant tending to support the testimony offered through Steve Homer. (R. 606-616.)

3. The court erred in holding that an agent's criminal acts cannot be imputed to the principal even where the agent is appointed to perform an illegal act. (R. 674.) (In this case the appellees admitted the facts constituting a violation of section 12-2-1, A.C.L.A. 1949, and appellant offered to show a loss of public funds resulting from this violation of the law and that the loss of public funds was a violation of section 65-5-63, A.C.L.A. 1949.)

4. The court erred in holding that the violations by appellees of section 12-2-1, A.C.L.A. 1949, was not also a violation of section 65-5-63, A.C.L.A. 1949. (R. 102, 665-6.)

5. The court erred in instructing the jury that the articles published by appellant, which are the basis of the action, constituted libel per se. (R. 97-8.)

6. The court erred in holding that the canceled checks issued on the special ferry fund were immaterial and that their loss by the appellees or others who had them in their possession was immaterial in these cases. (R. 672-3.)

7. The court erred in holding that bank deposits and checking accounts do not constitute a loan, creat-

ing the relationship of debtor and creditor between the bank and the depositor. (R. 102-666.)

8. The court erred in admitting in evidence, over the objection of appellant, a printed copy of a letter purported to have been written by Fred McGinnis. (Plaintiffs' Exhibit No. 8.) (R. 186.)

9. The court erred in giving that portion of Instruction No. 3 which reads as follows (R. 97):

“You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true, would be cause for his removal from office, is actionable per se.

“These presumptions of law make it unnecessary for the person to whom the commission of crime is imputed to prove malice or injury; but he may nevertheless make such proof for the purpose of showing the extent or degree of malice and of the injury and damage to his reputation and for the purpose of enhancing his recovery.”

10. The court erred in giving Instruction No. 6 (R. 104-5) and particularly that portion of it which reads:

“the defendant must show by a preponderance of the evidence that plaintiffs handled the money

wrongfully and fraudulently and with a criminal intent to convert such to their own use.”

11. The court erred in giving Instruction No. 7 (R. 105) where the court instructed the jury to disregard all testimony regarding the loss of public funds as not relevant to the issues involved and which instruction was based on the fact that appellant did not mention a loss of funds in the publication of September 25, 1952, and that therefore the loss of public funds was not an issue in the case and therefor was not relevant to the truth or falsity of the publication. In this connection defendant's proposed Instruction No. 22 (R. 85) was offered to the effect that the truth, whenever discovered, is a complete defense in a libel action. The court erred in denying that instruction.

12. The court erred in giving to the jury Instruction No. 4 and particularly paragraph one thereof. (R. 98.)

13. The court erred in giving a portion of Instruction No. 5 and particularly that part of it which reads as follows:

“You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution.” (R. 102-3.)

14. The court erred in giving that portion of Instruction No. 5 which reads as follows:

“Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds.” (R. 102.)

15. The court erred in giving Instruction No. 7 which reads as follows:

“During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry “Chilkoot” by the purser. You are instructed to disregard all of such testimony as it is not relevant to the issues involved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication.” (R. 105.)

16. The court erred in giving the first paragraph of Instruction No. 8 (R. 106), for the reason that the rejection of the testimony offered to show the loss of public funds through the acts of appellees made it impossible for appellant to establish in detail the truth of the claim of loss of public funds so as to show the close parallel of the case to that of Oscar Olson. Furthermore, the court erred in stating that this was not pleaded whereas it was set forth in paragraph three, second affirmative defense. (R. 21, 41, 49.)

17. The court erred in giving paragraph two on page two of Instruction No. 8 (R. 107), relating to

retraction, as there was no retraction involved in the case.

18. The court erred in refusing to give defendant's proposed Instructions Nos. 4, 5, 6, 7, 8, the last paragraph of No. 9, No. 10, No. 11 with the exception of the last sentence thereof which the court did give, Nos. 12, 13, 14, 16, 18, 20, 22, 23, 24, 26, 27, 28, 29, and 30. (R. 60-91.) Exceptions allowed: R. 688.

19. The court erred in submitting to the jury for its consideration the headlines in the publication of September 25, 1952, entitled "Reeve raps graft, corruption". (R. 665.)

20. The court erred in overruling appellant's motion for instructed verdicts and in permitting the cases to go to the jury. (R. 57.)

21. The court erred in overruling defendant's motion for judgment notwithstanding the verdict or for a new trial, and entering judgment for plaintiffs. (R. 129-131.)

All emphasis in this brief is ours unless otherwise stated.

SUMMARY OF ARGUMENT.

Appellant insists that the facts published by it on September 25, 1952, out of which these actions arose, were true, and that they were obtained from official source; that the truth is a complete defense in an action for libel; and appellant further insists that the parallel to the Olson case referred to in the articles

was “*in the matter of receipt and disbursement of public funds*”.

Appellant submits for the following reasons that the judgment of the trial court is wrong, and that there should have been a directed verdict in favor of the defendant in the lower court, and it contends here, as it did in the lower court, that certain errors were committed by the court throughout the entire trial as follows:

I.

It was error for the trial court to give that portion of Instruction No. 3 (R. 97) which reads as follows:

“You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. . . .”

It will be noted that the court in this portion of the instruction omitted to use the word “false” before the word “publication” in the first line.

In this connection the court overruled the appellant’s request for a holding and instruction that the publication was not libelous per se unless it was capable of only one construction, which in itself constituted libel. (R. 56-7.)

The appellant pointed out that the facts regarding the setting up and handling of the special ferry fund were admitted by all of the appellees and that the

only meaning which could be ascribed to the published articles was that in this connection they were charged in the articles with having done the same thing as Oscar Olson "*in the matter of receipt and disbursement of public funds*" and nothing more.

Appellees claim that the articles could be interpreted as meaning that the appellant was charging the appellees with stealing public funds or converting them to their own use, whereas there is nothing of that nature contained in the publication.

II.

The court erred in holding and instructing the jury that appellees had committed no crime and no offense involving criminal punishment by setting up the special ferry fund and depositing the earnings of the ferry in a special bank account subject to check only of an unauthorized person who was not a territorial official. (R. 103.)

In Instruction No. 5 (R. 100-104) the court refers to sections 11-3-8, 12-2-1 and 12-3-1, A.C.L.A., referred to in the letter from Neil Moore published in the newspaper (Plaintiffs' Exhibit 1), and then instructs the jury in the last paragraph of Instruction No. 5 (R. 104) as follows:

103 "No penalty is provided for violation of any of these provisions of law; but Section 12-3-3, A.C.L.A., provides that the officer or employee approving or certifying a voucher shall be held accountable for and required to make good to the Territory the amount of any illegal, improper, or incorrect payment prohibited by law or which did not rep-

resent a legal obligation of the Territory, which liability may be enforced by civil action.”

This instruction plainly told the jury that what the appellees had done in setting up the special ferry fund and causing it to be disbursed by their agent did not constitute a crime, whereas section 12-2-1, A.C.L.A. 1949, directs all persons having public moneys in their hands or under their control to pay them over to the territorial treasurer to be converted into the general fund, and section 65-5-63 provides a penalty for refusing or neglecting to do this, and section 65-5-63, A.C.L.A. 1949 is the statute under which Oscar Olson was sentenced. (R. 102.)

The whole of Instruction No. 5 (R. 100-104) is certainly misleading and contradictory. The court again in Instruction No. 5 (R. 103) uses the following language:

“Under the law any taxpayer would also have the right to enjoin any illegal receipt or disbursement of public funds prohibited by these statutes, or to compel any public official to comply therewith, but such does not make any such violation or failure to comply with such statutes a crime, that is, punishable by fine or imprisonment, or removal or disqualification from office.”

The court again in Instruction No. 6 instructed the jury:

“. . . that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defendant must show,

to justify the truth of such publication, not only that plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use. In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or to deprive the Territory thereof." (R. 104-5.)

III.

The court erred in ruling and holding that in order to be guilty of a violation of the law it must be shown that the appellees actually converted territorial funds to their own use.

What applies to the foregoing paragraph II is equally applicable here.

IV.

The court erred in taking the position all through the trial that the appellees were not criminally responsible for any acts of the purser Robert E. Coughlin, who they say was their agent (R. 353, 369, 384, 409) and who was appointed by them to have sole charge of the ferry fund. In this connection the court erred in denying appellant's proposed Instruction No. 27, and particularly that portion of it which reads as follows:

“If an agent is appointed to perform an illegal act and he does it, the one appointing him is responsible criminally, and if a tort is committed, he is civilly liable.”

Restatement: Agency, Volume 1, section 19.

“The possession of the ferry funds by Coughlin was the possession by plaintiffs. The disbursement of funds by Coughlin was the same as if it had actually been done personally by plaintiffs, and the loss of any portion of the funds would therefore be attributable to plaintiffs.” (R. 88-9, and 674.)

V.

The court erred in instructing the jury and in holding throughout the trial that the law presumes the publications were made maliciously and that this malice arose from the publication itself. What we have said under hearing No. I applies to No. V also and will be discussed in detail hereinafter.

VI.

The court erred in ruling consistently that the truth of a publication constituted no defense unless it was known at the time of publication.

While the appellant claims that since the facts set forth in the publication were true and that these facts constituted a violation of the law on the subject of embezzlement (section 65-5-63, A.C.L.A. 1949), still to overcome the court's holding, that refusal by the appellees to pay over public moneys coming into their hands, to the general fund of the territory, as the law directed, constituted no crime unless it was shown

that the funds were lost or embezzled, we offered evidence to show that there was actually a considerable loss of public funds through the appellees' method of handling them, and there was a violation of the statute which directed them to pay these funds into the general fund of the territory. This offer of proof was denied by the court and objections were sustained to our offer and to our questions. (R. 606-616 and Instruction No. 7, p. 105.)

We introduced in evidence Defendant's Exhibit C, consisting of two reports made by appellees' own auditor, Chris Ehrendreich, a public accountant, of the ferry fund. Another one is Defendant's Exhibit E, consisting of report of the official auditors of the Territory, Arthur Anderson Company, for the years 1951 and 1952, showing a shortage of ferry funds. These exhibits are not printed. Then we offered the testimony of Steve Homer to prove in detail the method by which the ferry funds were handled by purser Coughlin, and to show irregularities and loss of funds. (R. 606-616.) All this testimony was rejected, and our instructions on this point refused, for the reason that the appellant was not in possession of all the facts with reference to the loss of public funds at the time the articles were written but came into possession of those facts afterward and set up the loss of funds in its answers. (R. 21, 41, 49.)

VII.

The court erred in holding that the evidence regarding loss of public funds which appellant offered and the court rejected was immaterial and inadmis-

sible. (R. 608, 611.) What has been said under No. VI applies also to No. VII.

VIII.

The appellees charged that certain headlines in Plaintiffs' Exhibit 1 entitled "Reeve raps graft, corruption" being on the same page of the newspaper and alongside the articles referring to the appellees would give the reader the impression that the graft and corruption meant and referred to the appellees. In this connection appellant contended that the headline must be read in connection with the article of which it was the caption and which had not the remotest connection with the appellees.

Appellant raised this point on its motion for an instructed verdict, which was denied by the court (R. 55-6) and then the court refused to give Defendants' Proposed Instruction No. 5 to the effect that this headline should have no place in the jury's deliberations. (R. 62, 665.)

IX.

The court erred in rejecting Defendants' Proposed Instruction No. 18 regarding the absence of all cancelled checks issued on the ferry fund, which checks must have been in appellees' possession and were not available to defendants at any time. The defendants in this connection introduced proof that the cancelled checks could not be found in the office of the Treasurer, Highway Engineer, Finance Director, or Mrs. Coughlin, the widow and executrix of the estate of

Robert Coughlin, deceased (Defendants' Exhibits F, G and H, not printed, and testimony of Minnie Coughlin, R. 602-3.)) The court held that the nonproduction of these checks was immaterial (R. 672-3), notwithstanding the statute of Alaska quoted in the first two paragraphs of Defendants' Proposed Instruction No. 18. (R. 80-1.)

X.

The court erred in holding that a deposit of money in a bank in a checking account does not constitute a loan within the meaning of the statute. This is contrary to law and was highly prejudicial to the appellant, as we shall discuss hereinafter.

XI.

The court erred in admitting into evidence a purported copy of a letter said to have been written by Fred McGinnis. (Plaintiffs' Exhibit 8; R. 186.)

This letter was hearsay, incompetent and immaterial for any purpose, and its introduction and presentation to the jury was highly prejudicial.

In order not to make this summary too long and for the reason that we shall endeavor to confine this brief within the compass of the prescribed length, we have not set up in the summary the authorities applicable to our contention regarding the errors committed, but will go into that in more detail in the argument which follows.

ARGUMENT.**THE UNDISPUTED FACTS.**

We submit the following facts from the record about which there would appear to be no dispute:

Appellees as the Board of Road Commissioners of Alaska in 1951 purchased the ferry "CHILKOOT" to carry freight and passengers between Juneau and Haines, Alaska. There was no legislative authority for the purchase or operation. (R. 345.) Defendant's Exhibit D, not printed, is a report of the Highway Engineer, appellee Metcalf, for the years 1951 and 1952. This shows that the total expense in the purchase, repair and operation of the ferry "CHILKOOT" for the years 1951 and 1952 exceeded the revenue from the operation by over \$112,000.00. (Defts. Ex. D, pp. 11 and 13.) The deficit was paid from a road and harbor fund known as the Motor Fuel Tax Fund, which was under the jurisdiction of the Highway Engineer. (R. 389, 390.) On June 5, 1952, the board, consisting of the three appellees, held a meeting at Juneau. The minutes were introduced in evidence as Plaintiffs' Exhibit 9. (R. 351-2.) The following is an extract from those minutes:

"Mr. Roden felt that as long as every cent is accounted for, the ferry could be operated in part as a private enterprise and the purser could meet some of the expenses out of receipts rather than turn it back into the general fund. This recommendation was unanimously approved by the board. The Attorney General, Mr. Williams, offered no objections."

Mr. Robert E. Coughlin was employed by Metcalf as purser with the approval of the board and the account was set up in the B. M. Behrends Bank at the disposal of the purser. (R. 352-3.) The account was labeled "Chilkoot Ferry by Robert E. Coughlin", and Coughlin alone could write checks on the fund. (R. 409.) Salaries of crew members were not paid from this fund but on vouchers through the auditor's office. (R. 276-7.) Fifty-four checks were issued on the ferry fund. (Defts. Ex. C.) Coughlin was not required to furnish a bond. (R. 423-4.)

Appellees Gruening and Metcalf both said the ferry was purchased and operated as a link in the highway system. (R. 217, 337.) Appellee Gruening said the ferry account was established to "pay the crew promptly" (R. 199), although he said he knew nothing about the operation of the ferry account. (R. 199.) Mr. Roden said "Coughlin was our agent who could draw on those funds. (R. 409.) Aliens were employed and paid out of the ferry fund in violation of section 11-1-4, A.C.L.A. 1949. (R. 290.)

Three reports or audits were received in evidence showing shortages in the ferry funds and showing the manner in which the funds were handled. (Defendant's Exhibits C and E, not printed.) The court said these reports were not material (R. 105, 608) and the court rejected the testimony of Steve Homer, agent of the ferry at Haines, whose testimony was offered to show the details of the handling of the funds and of the shortage. (R. 611.)

The ferry fund account was closed at the bank by Auditor Moore and Assistant Attorney General John Dimond on August 20, 1952. After this bank account was ordered discontinued by Moore and Diomand, *the purser handled the funds in cash*. (Testimony of Metcalf, R. 391.) Appellee Gruening said the special fund was set up to pay the crew promptly, although the crew was not paid from this fund. He said the fund was set up because it was “*expedient and convenient*.” (R. 218.)

Metcalf said the ferry was part of the road system but he could not use the motor fuel fund in its operation because that fund was for roads, harbors and harbor facilities. (R. 337-8.)

Roden said the Attorney General approved the method of handling the ferry fund in an opinion. (R. 422-3.) Neither the Attorney General nor the opinion appeared at the trial and it was the Assistant Attorney General who said the fund was illegal and he went to the bank with the auditor to close the account. (R. 282.)

Although Mr. Steve Homer, the agent of the ferry at Haines, had told Mr. Daum, the Empire reporter who wrote the articles complained of, that there was something wrong with this ferry fund and suggested that he see the auditor about it (R. 460-1), the appellant did not know at the time the articles complained of were published of the shortages in the fund. That was discovered later.

I.

IT WAS ERROR TO RULE AND TO INSTRUCT THE JURY THAT
THE PUBLISHED ARTICLES WERE LIBELOUS PER SE.

We find the following in the court's instructions:

"You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true, would be cause for his removal from office, is actionable per se." (R. 97.)

The court does not say it is libelous per se to *falsely impute the commission of a crime*. It is true that in the language that immediately follows the first sentence above quoted the court says: "*It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer . . .*" However, this sentence does not qualify or contradict the first portion of the instruction set forth above, but even if it did, the court goes on to say again in Instruction No. 6 (R. 104-5):

"You are further instructed that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defendant must show, to justify the truth of such publication, not only that plaintiffs took the funds

accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, *but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use.* In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or deprive the Territory thereof.”

The admitted facts, *supra*, was the setting up of the ferry fund and the method of handling public moneys. It then became a question of law for the court, and if the court had applied sections 12-2-1 and 65-5-63 A.C.L.A. 1949 to the facts already presented to the jury, this instruction was erroneous and the appellant’s motion for a directed verdict should have been granted. This motion had already been presented, argued with supporting authorities, but denied by the court. (R. 55-57.)

The instructions as a whole are confusing to say the least, and the court instructed the jury that they were to “consider these instructions as a whole”. (Instruction No. 15, R. 115.)

The court’s holding that the publications were libelous per se is further shown in that part of Instruction No. 5 (R. 102-3) which reads:

“Sections 11-3-8, 12-2-1 and 12-3-1, Compiled Laws of Alaska, referred to in the published letter

from Auditor Neil F. Moore to the Attorney General, being a part of Exhibit #1, provide for payment of salaries and expenses of all officers and boards out of appropriations for that purpose, for payment of all fees, licenses, taxes or other money belonging to the Territory to the Treasurer, to be credited by him to the general fund, and for disbursement of public moneys by any disbursing officer of the Territory only upon vouchers certified by the head of the department, which are then referred to the Territorial Auditor for payment. Section 12-2-1 above was repealed by Chap. 133 SLA 1951, known as the 'Reorganization Act' which Act, however, contains substantially the same requirements. *No penalty is provided for violation of any of these provisions of law*; but Section 12-3-3, CLA, provides that the officer or employee approving or certifying a voucher shall be held accountable for and required to make good to the Territory the amount of any illegal, improper, or incorrect payment prohibited by law or which did not represent a legal obligation of the Territory, which liability may be enforced by civil action."

The error of the court in this respect consisted also in refusing to give Defendant's Proposed Instruction No. 6 (R. 65), and particularly the first paragraph thereof which reads:

"You are instructed that there can be no dispute about the facts published with reference to a setting up of the special ferry fund and of the receipts and disbursement of moneys in connection with the "Chilkoot" or Haines Ferry. This was done on the express authority of plaintiffs

acting as the Board of Road Commissioners for Alaska. I instruct you that this was a violation of the laws of Alaska.”

For a published article to be libelous per se, it must be susceptible of but one meaning. Judge Yankwich in his book entitled “*It’s Libel or Contempt If You Print it*” illustrates this principle of the law by reference on page 137 to the case of *Woolstrom v. Montana Free Press* (1931), found in 2 Pac.2d 1020, where the Supreme Court of Montana said:

“It is well settled law that the words used in the alleged libelous article must be susceptible of one meaning to constitute libel per se and that the libelous matter may not be segregated from other parts and considered alone.”

In the case before the court, appellees in their pleadings and testimony claimed that the article imputed to them the crime of theft or conversion of public funds to their own use. (R. 6-11-16 and testimony of appellee Gruening, R. 158-161.) However, in the publication the parallel drawn to the Oscar Olson case was always stated to be “*in the matter of the receipt and disbursement of public funds*” and nothing more. It is true that both Oscar Olson and the appellees had set up private bank accounts of public funds. All this was in violation of the statutes. The same punishment was prescribed in both cases under the same law, section 65-5-63. This parallel was explained by Neil Moore, the auditor (R. 295-299), and it was also explained by him in his letter to the Attorney General published in Plaintiffs’ Exhibit 1, not printed. There

was no charge in the published articles that anyone had converted funds to his own use. We discovered afterward that the agent who was wrongfully and illegally appointed by the appellees had apparently done so.

Many of the principles contained in our proposed instructions are stated to be the law of libel in the case of *Berg v. Printers' Ink Pub. Co.*, 54 F. Supp. 795 (D.C., N.D., N.Y.), affirmed in 141 Fed.2d 1022. The court said in that case (page 796):

“It is not the purpose of innuendo to graft a meaning upon or to enlarge the matter set forth, but merely to explain the application of the words used; and it must not put upon the words used a construction broader than they will bear.”

See also:

Brewer v. Hearst Pub. Co., 183 Fed.2d 846, 850.

The words in the publications under discussion here are plain and unambiguous, and under the admitted facts and the application of law to those facts, there could be no libel per se.

This section of the argument covers Point No. I supra and specifications of errors numbers 5, 9, 10 and 13. (R. ~~692~~, 700, 701.)

699

II.

IT WAS ERROR FOR THE COURT TO RULE AND INSTRUCT THAT UNLESS IT WAS SHOWN THE APPELLEES ACTUALLY CONVERTED TERRITORIAL FUNDS TO THEIR OWN USE, THEY HAD COMMITTED NO CRIME AND NO OFFENSE INVOLVING CRIMINAL PUNISHMENT.

The court ruled and instructed the jury that in order to constitute a defense, the defendant must prove that the appellees actually converted territorial funds to their own use, and the court further denied proposed instructions that to constitute a violation of section 65-5-63, A.C.L.A. 1949, it need only be shown that the plaintiffs had not complied with the Statutes of Alaska which provided that all public funds coming into the hands of any person must be turned over to the Territorial Treasurer and converted into the general fund within the time specified in the statutes, and that if this were not done, or if the funds were loaned, that was sufficient to constitute a violation of the statute.

In this connection we again call the court's attention to that portion of Instruction No. 5 quoted hereinabove in the first subdivision of this argument. (R. 102-3.)

The court further instructed the jury in Instruction No. 5 as follows. (R. 103-4):

“Under the law any taxpayer would also have the right to enjoin any illegal receipt or disbursement of public funds prohibited by these statutes, or to compel any public official to comply therewith, but such does not make any such violation or failure to comply with such statutes a crime,

that is, punishable by fine or imprisonment, or removal or disqualification from office.

By this the Court does not intend to comment in any way as to whether or not the actions of the plaintiffs relating to the 'Chilkoot' ferry fund were or were not illegal, which is a matter for the jury; but it is the intention of this instruction only to declare to you the remedy in case there may exist any such illegality.

You are therefore instructed that unless you find from the evidence that the facts reported in the news articles were sufficient to constitute the crime of embezzlement as above defined, no defense as to the justification of truth of the alleged libelous publication, which imputes the commission of a crime or criminal liability, may be based upon the construction of these statutes."

Again in Instruction 6 (R. 104-5) set forth in full hereinabove in the first division of this argument, the court instructed the jury that

"... the defendant must show, to justify the truth of such publication, not only that plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, *but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use.*"

In this connection the court also erred in refusing to give Defendant's Proposed Instruction No. 7 and in holding as follows (R. 666):

“Instruction No. 7 is denied because I can not find that the law defining the crime of embezzlement covers cases where public funds are not deposited in the right account, if it is so that they were not, unless there be a conversion of those funds to the use of such person, and that, as stated in the ruling upon defendant’s motion, the deposit of moneys in a bank account does not constitute a loan in violation of that statute. The court will instruct the jury instead that as far as the statutes concern embezzlement, that there is no parallel of fact in this publication. We will instruct the jury that as to any issue of the device claimed by Mr. Moore and other witnesses that that is presented although it is very difficult to prepare an instruction which will not be inconsistent upon that point. I will certainly try.”

Again (R. 665) the court said:

“The request that we instruct the jury that the actions of the plaintiffs, the Board of Road Commissioners, was a violation of these laws will be denied. That question is ^{not} for the court to determine.”

This was in his refusal to give our Defendant’s Instruction No. 6.

As we have said, the charge in the alleged libelous publications was that appellees had violated the law “*in the matter of receipt and disbursement of public funds.*” Nothing could be plainer than the fact that this is a crime under the provisions of section 65-5-63, A.C.L.A. 1949.

The laws of Alaska are not unlike many of the statutes of the United States and of the various states

when it comes to legislating for the protection of the public. The Alaska statutes define the crime of embezzlement not necessarily or solely as a conversion of funds of another to one's own use, but they make it the crime of embezzlement for public officials or persons having charge of public funds to handle them contrary to the manner prescribed by law. In cases under such statutes as referred to, it has been held over and over again that an actual theft of the money or conversion to one's own use is not necessary.

A case very much in point and we think almost exactly like the case before the court is the case of *Dimmick v. United States*, 121 Fed. 638 (9th Cir.). In that case the court sustained the conviction of an employee of a mint for failing to make deposit of public funds as the law and regulations required. Dimmick was an employee of the mint at San Francisco, and certain funds came into his hands during the December quarter. He was indicted under R. S. section 5492 which reads:

“Every person who, having moneys of the United States in his hands or possession, fails to make deposit of the same with the treasurer, or some assistant treasurer, or some public depository of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the treasury, shall be deemed guilty of embezzlement thereof, and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money embezzled.”

The regulations of the Treasury Department required that all such funds must be deposited on or before the end of the quarter in which received. Dimmick had received funds in the December quarter, and had not deposited them as the regulations directed before the end of that quarter. He did deposit the funds in the March quarter. He was indicted first for stealing the funds (on which indictment he was acquitted), and on two additional counts for violation of this statute, that is to say, for not paying over the money. He was convicted and he appealed to this court. The conviction was affirmed. The court said:

“It is true that by the language of section 5492, Rev. St. (U.S. Comp. St. 1901, p. 3705), it is declared that one who fails to comply with the requirement which directs him to deposit moneys of the United States shall be deemed guilty of embezzlement, but the offense consists, not in the imputed embezzlement of the money, but in the failure to comply with the direction to deposit. The offense may be complete without any actual embezzlement of money. It is committed when it is shown that there is a willful and felonious failure to comply with the specified requirements of the Secretary of the Treasury or the head of the proper department.”

The case of *United States v. Balint*, 258 U.S. 250, was a case involving the anti-Narcotics Act. There the Supreme Court said (p. 252):

“It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered

and overruled in *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' "

This case was followed by *United States v. Dotterweich*, 320 U.S. 277, which dealt with a violation of the Pure Food and Drug Act. There it is said (p. 281):

"Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."

Again in *United States v. Behrman*, 258 U.S. 280, 288, the Supreme Court said:

"If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent."

See also *United States v. Parfait Powder Puff Co.*, 163 Fed.2d 1008 (7 Cir.), which deals with the shipment of cosmetics in interstate commerce, and *People v. Stuart*, decided in April, 1956, by the District Court of Appeal, and found in 140 A.C.A. (Cal.App.2d), page 390.

Also

U. S. v. Kocmond, 200 Fed.2d 370, 374 (7th Cir. 1952).

This section of the argument covers our Points II and III, *supra*, and deals with Specifications of Error Nos. 4, 5, 10, 18, 20 and 21. (R. 698-700, 702-3.)

III.

THE COURT ERRED IN HOLDING AND INSTRUCTING THE JURY THAT UNDER THE STATUTES OF ALASKA THE APPELLEES WOULD NOT BE CRIMINALLY LIABLE FOR ILLEGAL ACTS OF THEIR AGENT.

The court gave Instruction No. 6 (R. 104-5) which is set forth in full in subdivision 1 of this argument, to which reference is made. In this instruction the court said that the defendant must show, in order to justify the truth of the publication, that plaintiffs handled the money wrongfully and fraudulently *with a criminal intent to convert it to their own use*. We respectfully request that the court read the whole of this instruction, which, as we say, is set forth hereinabove.

The court refused to give Defendants' Proposed Instruction No. 27 (R. 88-9), which reads:

"It is admitted that plaintiffs, as Board of Road Commissioners, authorized the handling of the ferry funds in the manner described in the publication complained of. They constituted Robert Coughlin, the purser of the ferry boat 'Chilkoot' their agent to receive these funds and to disburse them by check without any counter-signature. Therefore, Coughlin became the agent of the plaintiffs and his acts in the receipt, disbursement and handling of the ferry funds were the acts of plaintiffs.

If an agent is appointed to perform an illegal act and he does so, the one appointing him is responsible criminally and if a tort is committed, he is civilly liable. Restatement: Agency, Vol. 1, section 19.

The possession of the ferry funds by Coughlin was the possession by plaintiffs. The disbursement of the funds by Coughlin was the same as if it had actually been done personally by plaintiffs. The loss of any portion of the funds would therefore be attributable to plaintiffs."

It was not necessary that plaintiffs have actual possession of the funds. In *Garner v. State*, 158 So. 546, Appellant Garner was convicted of embezzlement of public funds, not in his possession.

The Supreme Court of Alabama said in that case:

"Under our statutes, 'embezzlement' includes statutory offenses which do not embrace all the elements of the English offense of embezzlement. The acts made a crime by section 3961, Code, omit some of the essentials of that crime, but the statute declares that such conduct is embezzlement. So that to sustain a conviction on a charge of embezzlement under that Code section, it is not necessary that all the elements of the offense as it existed under the early English act (*Knight v. State*, 152 Ala. 56, 44 So. 585) be proven or charged, if the acts declared by the statute are proved and charged. And a general charge of embezzlement may be proven by such statutory requirements. *McGilvray v. State*, 228 Ala. 553, 154 So. 601.

We cannot agree with petitioner therefore that an indictment under section 3961, Code, must aver

possession of the funds by defendant or a fraudulent intent. *Ex parte Cowart*, 201 Ala. 525, 78 So. 879.

As we understand the facts stated in the opinion of the Court of Appeals, they are, in substance, so far as here necessary to recite them, that the \$75 a month was paid appellant, who was one of the city commissioners, for services rendered the city, to perform which he had not been, and could not be, legally employed by the city commission. But he was paid on warrant issued by the city clerk and approved by the mayor, but not authorized by the city commission, and, further, that this could not be legally done by the commission. The theory of the opinion is that no such disbursements are authorized by law; that appellant knew that fact; that the funds were under the control of the city commission of which he was a member, and that, therefore, he was wrongfully converting to his own use city funds which were under his control jointly with other commissioners; that this was wrongful because not authorized by the commission, and prohibited by law. Sections 1891 and 1910, Code."

In *People v. Knott*, 104 Pac. 2d 33, there is the following language of the Supreme Court of California:

"Although the County treasurer is charged with the receipt and disbursment of County money (Sec. 4901 Pol. Code), such funds, at least to a limited extent, are within the control of the auditor. One who is not in possession of money may have it under his control in the sense that it is under his direction and management. * * *"

In that case a County auditor was convicted of embezzling money not in her possession.

“One who owes a certain duty to the public and entrusts its performance to another, whether it be an independent contractor or agent, becomes responsible criminally, for failure of the person to whom he has delegated the obligation to comply with the law, if the non-performance of such duty is a crime.”

U. S. v. Parfait Powder Puff Co., 163 Fed. 2nd.
1008 (7th Cir. 1947.)

Appellees, throughout their testimony, professed to know little about the details of the “ferry fund”, but the following testimony of appellee, Roden, in answer to questions of Mr. Nesbitt, his counsel, is interesting:

“Q. Mr. Roden, as a member of the Territorial Board of Road Commissioners, were you ever informed that there was any shortage in the moneys handled by Robert E. Coughlin?

A. Well there was a report came out at one time and I talked that over somewhat with the Attorney General in the most casual manner. I was never called about it at all or advised of anything definite * * *

Q. Did you know that any shortage purportedly or might have existed?

A. I was positive there was no shortage.” (R. 419.)

Appellant made an offer of proof of loss of funds through the acts of the appellees’ agent Coughlin. This was done while the witness Steve Homer was on the stand. (R. 606-616.) This offer was rejected. In making that offer, the following occurred while the witness Homer was on the stand. (R. 610.):

“Mr. Faulkner. I further offer—I state this because—I might as well state it now—I further offer to prove by Mr. Homer that there were illegal payments made out of this fund; that there was payment to aliens, which is contrary to the Territorial law; that there were advances claimed to have been made in wages which were not made; and that there was a very considerable loss of public funds; and their connection with the plaintiffs is that they expressly authorized the handling of the funds by Mr. Coughlin and that they are responsible for his acts. Mr. Roden stated, and as the proof shows, he was their agent.

The Court. That may be permissible except for this fundamental fact, counsel, and that is this publication charges these plaintiffs with commission of a crime, and that we cannot deny. Even if what you say is true, there would be no criminal liability of the members of the Board for such acts unless it be shown that they were accessories to it, and there is no such charge in the publication. We cannot go into something which is wholly collateral. There is no action against plaintiffs for diversion of funds.

Mr. Faulkner. They brough the action themselves on the article which refers to diversion of funds, diversion of funds out of the normal channel provided by law into an unauthorized person's hands who lost the funds.”

Aside from the fact that the appellees themselves were criminally liable under sections 12-2-1 and 65-5-63 A.C.L.A. 1949, for setting up the special ferry fund and in not placing the receipts in the general fund of the treasury, they would certainly be also criminally

liable for the loss of the funds under the circumstances, through their agent. This phase of the case might not seem to be important because the law makes it an offense for any person having possession of public funds not to pay them into the general fund, and that alone should be sufficient, but since appellees read into the publications of the appellant that the appellant was charging the appellees with actual theft or misappropriation of the funds, we made every effort to show that there was an actual loss and embezzlement of public money through the agent and that this as a matter of law should be attributable to the appellees.

“One may not properly appoint an agent to commit a criminal or otherwise illegal act, but the appointment is ordinarily not wholly ineffective. If the one directed to perform the act does the act directed, the person directing him may be responsible criminally, and if a tort is committed, civilly.”

Restatement. Agency, section 19.

Section 65-3-2 A.C.L.A. 1949 reads:

“All persons *concerned* in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the crime or aid or abet in its commission, though not present, are principals and to be tried and punished as such.”

A case which we think is squarely in point here under this statute is *Rosencranz v. United States*, 155 Fed. 38 (9 Cir.).

“One who owes a certain duty to the public and entrusts its performance to another, whether it

be an independent contractor or agent, becomes responsible criminally for failure of the person to whom he has delegated the obligation, to comply with the law, if the nonperformance of such duty is a crime.”

United States v. Parfait Powder Puff Co., 163 Fed.2d 1008 (7 Cir.) supra.

See also *United States v. Balint*, supra; *United States v. Dotterweich*, supra, and *United States v. Wilson*, 59 Fed. 2d 97.

These matters were all presented to the trial court on defendant's motion for an instructed verdict, argued at length with authorities, but the motion was denied. (R. 55-6-7.)

This section covers Points III, IV and VII set forth hereinabove and Specifications of Error Nos. 2, 3, 10, and in part 18, 20 and 21. (R. 698, 700, 702-3.)

IV.

THE COURT WAS WRONG IN STATING AND INSTRUCTING THE JURY THAT THE LAW PRESUMES THE PUBLICATION TO BE MALICIOUS.

The court rejected Defendant's Proposed Instruction No. 16 and that portion which reads as follows:

“ . . . In this connection you are instructed that the burden of proving malice is on the plaintiffs. The defendant is not required to prove absence of malice (*Curtis Publishing Co. v. Frasier*, 209 Fed.2d 1). You will see moreover that the burden is on the plaintiffs to prove by a preponder-

ance of evidence to your satisfaction the material allegations of the complaints before they are entitled to recover anything from the defendant. Malice has been described as follows:

‘The malice which avoids the privilege is actual or express malice, existing as a fact, at the time of the communication, and which inspired or colored it. Such malice exists where one casts an imputation which he does not believe to be true, or where the communication is actuated by some sinister or corrupt motive or motives of personal spite or ill will or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act. (*International & G.N.R. Co. v. Edmonston*, 222 S.W. 185; *Jones v. Associated Aviation Underwriters*, 203 Fed.2d 208.)

In this connection you are instructed that there is no allegation in the complaints that the defendant did not believe the statements published to be true.

The law raises a presumption of good faith on the part of defendant and even negligence on the part of defendant can not take the place of malice. There is neither allegation nor proof that the defendant did not believe the statements which it published to be true, and in the absence of such allegation and proof, no malice can arise in this cause.” (R. 78-9.)

We have no law in Alaska covering civil actions for libel. This court in the case of *Golden North Airways v. Tanana Publishing Co.*, 218 Fed.2d 612, at page 623, says that “we may adopt the definition of

the common law which declares libelous every *false and unprivileged* publication which exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided or which tends to injure him in his occupation." There is no malice in law in the State of California.

The record shows that all the appellees were holding public office, two of which were elective and one appointive. One appellee, Metcalf, was at the time of the publication a candidate for reelection to the office of Highway Engineer. ~~In~~ ^{One} of the leading cases on libel, which is referred to by this court in *Golden North Airways v. Tanana Publishing Co.*, supra, is *Coleman v. McLennan*, 98 Pac. 281. There is in that case a lengthy and interesting discussion of malice. The court approved an instruction to the jury which read as follows:

"A communication made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. And, where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office, and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith, and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff,

and in such a case the burden is on the plaintiff to show actual malice in the publication of the article.”

It may be argued that appellee Gruening introduced considerably testimony and a number of exhibits in order to establish malice toward him on the part of the publisher of the Empire, and it may well be said that there was a conflict in this respect. The publisher, Mrs. Munson, strenuously denied that she was actuated by any malice or ill will, but that her course of conduct in publishing the paper was in the interest of ^{the}_n territory and there was nothing personal in her actions. This, of course, would be a question for the jury, unless the published article contained facts which were true, as we contend this one did. However, there was no testimony regarding any ill will or malice on the part of the defendant toward either of the plaintiffs, Roden or Metcalf.

Perhaps the argument on this point is superfluous because we think the publication contained the truth and that the comment constituted fair comment and privilege, and under those circumstances the question of malice would be immaterial.

This section covers Point No. V and Specifications of Error Nos. 5 and part of 18. (R. 699, 702.)

V.

IT WAS ERROR TO HOLD, RULE, AND INSTRUCT THE JURY THAT TRUTH IS NOT A DEFENSE UNLESS KNOWN AT THE TIME.

This section deals with the additional defense that not only was there a violation of law in setting up and disbursement of public funds, but that the illegally appointed agent of appellees embezzled or lost a substantial portion of them.

The court gave Instruction No. 7 (R. 105) as follows:

“During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry ‘Chilkoot’ by the purser.

You are instructed to disregard all of such testimony as it is not relevant to the issues involved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication.”

The court refused to give the last paragraph of Instruction No. 6 (R. 64-5) requested by defendant, which reads:

“It is also undisputed that the certified public accountants and auditors who audited the books and accounts of the territory, its boards, agencies

and officials for the years 1951-2, found discrepancies in the special ferry fund account and a shortage of \$300.58, and that they also found that the accounts had not been accurately kept, but kept in such manner that it was impossible to ascertain from any source the exact status of the ferry funds."

and defendant's proposed Instruction No. 22 (R. 85) which reads:

"You are instructed that in all libel cases, the truth of facts published is a complete defense. Motive and purpose are immaterial. If the charges are true, it doesn't matter whether defendant knew at the time the facts were published they were true, but discovered that afterward, for the truth whenever discovered is a complete defense.

Yankwich, *'It's Libel or Contempt If You Print It'* pp. 359-60."

The shortage in the ferry accounts was pleaded by defendant in its answers to the amended complaints (R. 21, 41, 49.)

The court's position on this is also found in his ruling on defendant's offer of proof while the witness Homer was on the stand. (R. 607-611.) The following occurred:

"Mr. Faulkner. Just a minute, your Honor. I haven't finished, Then we propose to introduce some other checks that did not get into the special ferry account, didn't get into the public funds at all. I want to show the method, the endorsements on them, and they are issued by Mr. Homer.

The Court. Do you propose to show anyone connected with the Juneau Empire knew anything about it?

Mr. Faulkner. No. I don't think I have to.

The Court. I think you have to.

Mr. Kay. Do you intend to show one penny did not eventually go into Territorial possession?

Mr. Faulkner. I do.

Mr. Kay. How?

Mr. Faulkner. By showing——

Mr. Kay. Let's say he issued a check to Bobby Coughlin and it was cashed at a grocery store. Does that demonstrate what was done? No; not one iota.

Mr. Faulkner. Coupled with Mr. Ehrendreich's audit——

Mr. Kay. It shows it was accounted for.

Mr. Faulkner. No, it doesn't.

The Court. I cannot see where *either the audit* or this offer of proof has any bearing upon the truth or falsity of this alleged libel, and that is the issue we are trying here.

Mr. Faulkner. It is the very heart of the case, your Honor.

The Court. There is no allegation or charge in the publication regarding any shortage that I am able to find. The charge is that these men wrongfully or illegally disbursed funds without putting them through the treasury. Anything that Coughlin did with regard to the money *or this audit is wholly irrelevant.*

Mr. Faulkner. I would have to take exception to that because it is the heart of the case.

The Court. It has nothing to do with the case as far as I can see.

Mr. Kay. Nothing.

Mr. Faulkner. I will make a further statement. This connection of the plaintiffs with public funds——

The Court. Well——

Mr. Faulkner. A statement for the record. The purpose is to show that the plaintiffs entrusted public funds to an unauthorized person without a bond and that a considerable portion of those funds was lost to the Territory.

The Court. We are not trying these parties either on any civil or criminal action for unlawful—well—or for failure to account for these funds. The issue here is solely whether this publication is true or false, and this evidence can have no possible bearing on it because nothing is suggested in the editorials or articles regarding a shortage of funds. There is no such charge.

Mr. Faulkner. My understanding of the law from the Restatement of the Law, which I can cite to your Honor, is that, where an official or anyone else entrusts funds illegally, unlawfully, to another person and where they are lost and embezzled, he is criminally and civilly liable.

Mr. Nesbett. That has no bearing on the issues raised in the pleadings.

The Court. Precisely.

Mr. Faulkner. But——

The Court. In any event, it has no bearing on this case, no bearing whatever. We must confine the issues to the publication, whether it is true or false. That is all we are concerned with.”

Then again in this offer of proof we find (R. 611-12):

“The Court. There is nothing whatever in the published publication inferring or in any way mentioning any loss of funds.

Mr. Kay. That is right.

The Court. Therefore, it is not in issue in this case.

Mr. Faulkner. That is true, but the law is that the truth of the facts whenever and wherever discovered are admissible as a defense.

The Court. Such issue would have no relation to the truth or falsity of the libel—nothing.

Mr. Faulkner. Well, I don't think I can ask Mr. Homer any questions under the ruling of the Court, and, again, I would have to except to your Honor's ruling.”

The record shows that the counsel and court reporter withdrew from the bench and were again within the hearing of the jury and the trial proceeded as follows:

The Court. The objection of the plaintiff to the last question to the witness Homer will be sustained and the offer of proof made by counsel is denied on the grounds that it is not relevant to the issues in this case.

Mr. Faulkner. I just wonder if in connection with the offer, I shouldn't offer the exhibits I was going to offer through Mr. Homer.

The Court. If you wish.

Mr. Faulkner. I think perhaps I better have the reporter come up——

The Court. Well, that could make no difference. You may offer them. It would not be necessary to identify them. Your offer is denied for the reasons stated because it would be irrelevant,

so, whether it is sufficiently identified or not, it makes no difference because they are irrelevant.

Mr. Faulkner. I think I stated in the objection—I mean, in the offer—what we intended to prove by these checks.

The Court. Yes; that is understood.

Mr. Faulkner. If that is understood, it is all right.”

The report of Arthur Anderson Company, the official auditors, shows a shortage of \$300.26, and that it was impossible to ascertain from any source the exact status of the fund because of the manner in which the books and accounts had been kept. (Defendant’s Exhibit E, not printed.) Ehrendreich, the auditor employed by appellees, made two reports on the same day, October 10, 1952, after the suits were filed. (Defendant’s Exhibit C, not printed.) One report says:

“We were unable to verify the \$4106.07 alleged to have been paid for advances; however, we have no reason to doubt that they had actually been paid as claimed.”

Three checks of \$100.00 each were issued to Coughlin as *advances*, and there was nothing on record to substantiate repayment, and two checks issued to Steve Homer as a “*personal loan*” with nothing to substantiate repayment except Coughlin’s word. This report also shows: “Salaries and advances to crew, \$1595.65”. The claimed “Salaries and advances to crew” seems rather puzzling in the face of the fact that all salaries were paid through the Auditor’s Office in the regular manner and none from the special ferry fund. (R. 276-8.)

The other report of Mr. Ehrendreich of October 10, 1952, contains no mention of discrepancies or shortages, and it may be significant that it is labeled "*Short Statement for Publication*".

Mr. Homer, who was employed on the ferry "Chilkoot" and also as the Haines agent, was sworn as a witness, and he offered to explain these shortages by reference to the Ehrendreich reports and in explanation of some of the items in this very strange and unusual audit, but the court said (R. 608):

"I cannot see where *either the audit* or this offer of proof has any bearing upon the truth or falsity of this alleged libel, and that is the issue we are trying here."

and the offer of proof was denied, *supra*. The cancelled checks of Homer which we offered to explain shortages were also ruled immaterial and rejected by the court as irrelevant. (R. 611-12.)

If the parallel to the *Olson* case "*in the matter of receipt and disbursements of public funds*" was not complete, under the trial court's theory, unless there could be shown an actual misappropriation of funds, we offered the evidence to show such misappropriation by appellees' illegally appointed agent and the consequent loss of public funds.

In Judge Yankwich's "*It's Libel or Contempt If You Print It*", we find this at page 358:

"(2) *The Law Today*. At the present time the truth is a complete defense to an action for civil libel. It is not necessary to dwell at length upon the justice of this rule."

Then he quotes some of the language from a decision of the Supreme Court of Kansas, *Castle v. Houston*, 19 Kan. 417, as follows:

“... On general principles no right to damages can be founded on a publication of the truth from the consideration that the reason for awarding damages is every such case fails. The right to compensation in point of material justice is founded upon deception and fraud which have been produced by defendant to the detriment of plaintiff. If the imputation is true, there is no deception or fraud and no right to compensation.”

Many other authorities are also cited by Judge Yankwich in this connection. And again he says at pages 359-60:

“Nor does it matter that the defendant did not believe the charges to be true when he made them and only discovered their truth afterward. The important thing is that they be in fact true and the truth whenever discovered is a complete defense.” (Citing other cases.)

The rule is set forth in *Restatement: Law of Torts*, section 582, comment (g):

“While the truth of a defamatory publication is a complete defense under the rules stated in this section, a mistaken belief in the truth of the matter published, although honest and reasonable, is not a defense unless it is published on a privileged occasion. *On the other hand if the defamatory matter is true, it is immaterial that the person who publishes it believes it to be false; it is enough that it turns out to be true.*”

This section of the argument covers Points VI and VII, supra, and specifications of error Nos. 2, 10, 11, 15, 16, part of 18, and 20 and 21. (R. 698, 700, 702, 703.)

VI.

IT WAS ERROR TO SUBMIT TO THE JURY FOR ITS CONSIDERATION HEADLINE ENTITLED "REEVE RAPS GRAFT, CORRUPTION".

This headline did not have the remotest connection with any one of the appellees; nor did the news story of which it was the caption. Appellees complained of it because a copy of a ferry account check was published beneath a portion of the headline. All these appeared in Plaintiffs' Exhibit A, not printed. All that it is necessary to do to see the irrelevants^{cy} of this headline is to read it and examine the article which it heads.

Appellant requested the court in its motion for a directed verdict to disregard this headline and the Reeve article, and when this was denied Instruction No. 5 was requested by defendant (R. 62):

"You are instructed that you are to disregard the article complained of which bore the headline 'Reeve Raps Graft, Corruption'. It has not been shown that this article even remotely refers to any one of the plaintiffs. Furthermore, that appears from reading the article. It has no connection with anything else which appears in the Empire on September 25, 1952, and therefore should have no place in your deliberations."

This instruction was denied. (R. 655.)

It seems to be well settled in the law of libel that a word, phrase or headline may not be considered alone. There is an abundance of authority on this, and we shall cite only one which we cited to the trial court in the motion for dismissal or instructed verdict, and that is the case of *Rose v. Indianapolis Newspapers, Inc.*, 213 Fed.2d 227 (7th Cir.). This case dealt with a headline and the court said:

“The fallacy in plaintiff’s argument is that it conflicts with this cardinal rule of the law of libel, which ‘flatly prohibits’ any attempt to wrench a word or a phrase of an article out of context and base an action thereon. The whole of the reported article must be considered in determining whether it is actionable and whether it transcends a substantially true statement of the facts. We conclude, therefore, from a consideration, of the whole of the publication, that there is nothing to justify a finding or an inference that the reporter exceeded a substantially true statement of the facts. The essential truth of a news report is always a defense to an action for libel.” (Citing authorities.)

This section covers Point No. VIII, *supra*, and specification 19. (R. 702-3.)

VII.

IT WAS ERROR TO REFUSE TO INSTRUCT THE JURY TO TAKE INTO CONSIDERATION THE LOSS OF THE CANCELLED CHECKS ON THE FERRY FUND.

Defendant requested the court to give the jury its proposed instruction No. 18 (R. 80-85), the first three paragraphs of which read as follows:

“A witness wilfully false in one part of his testimony may be distrusted in other parts.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

In this connection you are instructed that the plaintiffs have not produced here the records of the Chilkoot Ferry fund transactions. These records should be in the office of the Highway Engineer and all documents, checks, bank statements, and other instruments and papers in writing concerning the bank account which is mentioned in the pleadings herein should be on file in either the office of the Territorial Treasurer or the office of the Highway Engineer. The certificates of these officials and of the Commissioner of Finance, who succeeded to the office of Auditor, have been introduced in evidence showing that no canceled checks are in either of their offices. It was the duty of the plaintiffs to have seen that these checks, other instruments and bank statements were filed in the proper office and you are instructed that if

any person having custody of any public record, book, paper or writing shall wilfully destroy, secrete or mutilate the same, he is guilty of a crime and liable to punishment under the provisions of Section 65-7-21, ACLA 1949.

The plaintiffs were all Territorial officials at the time these records were made and at the time the checks were issued, and it was their duty to produce the records before you or to explain why they were not produced and what disposition was made of them. . . .”

The court gave the first two paragraphs of this instruction, but refused the third paragraph and all that followed. (R. 80, 85.) This part of the proposed instruction dealt with the cancelled checks issued on the “Chilkoot Ferry” account in the Behrends Bank. Defendant had demanded in writing that plaintiffs produce them in court. (R. 404.) Then defendant introduced certificates of the present Highway Engineer, Treasurer and Finance Commissioner to show that none of these checks was in their offices. (Defendant’s Exhibits F, G and H.) It also introduced the testimony of Mrs. Minnie Coughlin (R. 602), widow of Robert E. Coughlin and executrix of his estate, who stated that she had searched deceased’s effects and papers, but could find no checks.

All the appellees remained in their respective offices for more than six months after this suit was filed. No effort was made to preserve them or photostat copies of them. They just mysteriously disappeared. Metcalf, the Highway Engineer, in whose office they

should have been filed, said he did not look for them and did not know where they were. (R. 385.)

These checks would have been of extreme importance, for an inspection of them would have enabled the court and jury to see just where the ferry funds went, how they were expended, for what purpose, and the amount of the loss.

The court held the cancelled checks were immaterial and inadmissible, thereby holding in effect that no matter what they would have disclosed it would have made no difference. We think the court should have given paragraph 3 of defendant's proposed Instruction No. 18, and have permitted defendant's counsel to comment to the jury on the disappearance of these checks and their nonproduction by plaintiffs. Defendant's attorney was denied that right by the court's ruling.

This section covers Point IX and specification of error No. 6.) (R. 699.)

VIII.

IT WAS ERROR TO HOLD THAT DEPOSIT OF MONEY IN A CHECKING ACCOUNT IN A BANK DOES NOT CONSTITUTE A LOAN.

Instruction No. 5 (R. 102) tells the jury that

“the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds”.

Defendant Proposed Instruction No. 7 (R. 66-7) reads in part as follows:

“The law defining the crime of embezzlement covers cases where public funds are converted by defendant to his own use and also where they are not received and disbursed in accordance with the statutes of the Territory. *It also covers deposits in bank accounts of public funds without authority of law . . .*”

In refusing this instruction the court said (R. 666):

“Instruction No. 7 is denied, because I cannot find that the law defining the crime of embezzlement covers cases where public funds are not deposited in the right account, if it is so that they were not, unless there be a conversion of those funds to the use of such person, and that, as stated under the ruling on defendant’s motion, *the deposit of moneys in a bank account does not constitute a loan in violation of that statute.*”

This point is important in connection with the parallel to the *Olson* case, for he used “the same device”. (R. 296-299.)

It would seem that the nature of a deposit with the bank in a checking account is well settled, and that is, it is a loan by the depositor to the bank creating the relationship of debtor and creditor.

“The deposit of money by a customer with his bank is one of loan with a super added obligation that the money is to be paid when demanded by a check.”

Davis v. Elmira Sav. Bank, 161 U.S. 283, 288.

It cannot be doubted that, except under special circumstances, or where there is a statute to the

contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have the debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character.”

N. Y. County Bank v. Massey, 192 U.S. 138, 145.

“Deposits with or without interest are nothing but a loan of money.”

Bank v. Lanier, 78 U.S. 369, 375.

See also *Bramwell v. U. S. Fid. & Guar. Co.*, 299 Fed. 705 (9th Cir.); *Citizens Natl. Bank v. Linneberger*, 45 Fed.2d 522, 528 (4th Cir.); *City & County of S.F. v. Mackey*, 22 Fed. 602, 608; *Keller v. Frederickstown Sav. Inst.*, 10 A.L.R.2d 426.

But what about the advances to Coughlin and Homer disclosed by the Ehrendreich report (not the one labeled “for publication”, but the other one); (Defendant’s Exhibit C, not printed). Ehrendreich, appellees own auditor, found that there were “*advances*” of \$300.00 made to Coughlin and two checks for something over \$200.00 issued as a “*personal loan*” to Steve Homer, the repayment of which could not be substantiated by the report. Surely these constituted a loan.

Appellees authorized all this when they set up the special fund and appointed a man to handle it

without a bond and with no check on his disbursements. The whole thing was illegal, unauthorized and a violation of the statutes for the protection of the public funds. Appellees should hardly be awarded punitive damages in the sum of \$15,000 because the newspaper, in pursuance of its duty, made the matter public and commented on the facts, even though the comment may have appeared harsh, for as this court said in *Smith v. Levitt*, 227 Fed.2d 855, 858 (9th Cir.) 1955:

“Political figures are the subject of discussion. It would go far to limit that public enlightenment in regard to public personalities if the court should hold that attack and defense of such figures cannot be made in the press. He who seizes the sword may be wounded by a sword.”

And again in the recent case of *Borg v. Boas*, 231 Fed.2d 788, at 794 (9th Cir.):

“The public press performs its most valuable function in the interest of the people at large by correctly reporting proceedings which relate to the administration of law. It is vital in a country which relies upon representative officials that the public be so informed. Otherwise there is no guard against maladministration.”

This covers point X, *supra*, and specifications of error Nos. 14 and part of 18. (R. 701-2.)

IX.

THE ADMISSION OF THE PURPORTED COPY OF THE FRED MCGINNIS LETTER WAS PREJUDICIAL ERROR.

Counsel for appellees introduced in evidence over defendant's objection a purported copy of a letter from Fred McGinnis, said to have been written to the defendant. The copy was not signed. It was objected to as hearsay, as expressing the alleged writer's views on three or four different things, and incompetent and immaterial. The letter is set forth in full at R. 183-9. While the court ruled that a portion of the letter was hearsay (R. 186-7), it is in the record and went to the jury (R. 186-7), and our ~~our~~ objection to the introduction of the letter was overruled. (R. 186.) Appellee Gruening's introduction of this letter constituted hearsay, because he did not have the original, and the appellees did not produce the witness McGinnis. The harm consisted in our not being able to cross-examine him and learn from him whether he ever wrote such a letter, who prompted it, how much knowledge he had of the defendant, and how long he had been in the Territory. If the letter was genuine, and there is nothing to indicate that it was, the opinion at best is the opinion of one man and it is certainly not the best evidence. (Specification of Error No. 8, R. 699.)

X.

THE METCALF CASE.

In the case of Metcalf, the jury found a verdict of \$5,000 punitive damages, although he did not request

punitive damages in the prayer of his complaint. (R. 17.)

After first instructing the jury on compensatory damages, the court goes on to say in the third paragraph of Instruction No. 9 (R. 109, 110):

“As to exemplary or punitive damages you are instructed that if you find from a preponderance of the evidence that the articles and editorial were published recklessly, wantonly, out of spite or ill will, or with utter disregard for the rights of the plaintiffs, *you may also award each of them such further sum, not exceeding the amount asked for, by way of exemplary or punitive damages as in your judgment you believe should be fairly assessed against the defendant.*”

Metcalf did not ask for any sum for punitive damages. Although he alleged malice, he simply asked for damages in the sum of \$100,000, with no separate claim for punitive as distinguished from compensatory damages.

Appellant admits that counsel for appellees asked the court at the opening of the trial for leave to amend the complaints of both Roden and Metcalf and to ask for punitive damages in both cases. They did so amend the Roden complaint, but not that of Metcalf. (R. 7, 17.) Metcalf asked just for damages. Punitive damages are in a different realm. They are said to be in the nature of punishment or a fine for the protection of society.

Newell on Slander and Libel, 4th Ed., 814, discusses punitive damages and quotes from *Holmes v. Holmes*, 64 Ill. 294, where it is stated:

“The principal grounds upon which the doctrine of exemplary damages has been assailed, is that it is a false theory, and inconsistent with the nature of the proceeding, to mix the supposed interests of society with those of an individual in the pursuit of purely private redress for a private injury, and is subject to great abuses . . .”

Newell admits, of course, that the courts had allowed punitive damages in proper cases. In the case now before the court the jury in effect punished the defendant by what amounts to a fine of \$5,000 for inflicting actual damages amounting to \$1.00 to Metcalf and under a complaint where he had not requested the \$5,000.

Rule 9(g) reads:

“When items of special damage are claimed, they shall be specifically stated.”

Surely the words “special damage” within the meaning of the rule includes more than the term as applied in libel cases for pecuniary loss or injuries to business, etc.

In the case of *Burlington Transp. Co. v. Josephson*, 153 Fed.2d 372 (8th Cir., 1946), the trial court, in a case where plaintiff sued for false arrest, alleged to have been wilful, false, forcible and without right, allowed the plaintiff to testify as to injuries to his business, pecuniary damage, etc. The court then instructed that these special damages might be considered by the jury. The Court of Appeals reversed the judgment and held that general damages only were

claimed in the complaint and that nothing more could be recovered.

This section of the brief refers to specifications of error Nos. 20 and 21. (R. 703.)

XI.

FAIR COMMENT AND PRIVILEGED CRITICISM.

Since the facts regarding the diversion of public funds and the refusal and neglect of appellees to turn them over to the general fund of the Territory are undisputed, the criticism of appellees in the publication was privileged and the comment was fair comment. The court refused to instruct that "fair comment" is not libel. (R. 673-4.)

Appellant urged throughout the trial that since the essential facts were undisputed, and since the acts of appellees were a violation of the statutes of Alaska and paralleled the *Oscar Olson* case in the receipt and disbursement of public funds, the comment of appellant was fair and its criticism privileged.

It is well settled that fair comment on facts truly stated is not libel. I shall not lengthen this brief or burden the court with a list of authorities on this point.

This court considered this in the case of *Golden North Airways v. Tanana Publishing Co.*, 218 Fed. 2d 612, at 627, and said:

"At times 'fair comment' and 'privileged publications' are used synonymously. But in reality they

are not the same. For in privileged publication there would be libel but for privileged occasion—while fair comment is not libel.”

Gatley on Libel and Slander, 4th Ed. 1953 p. 335 et seq.;

Restatement, Torts, Sec. 606;

Thayer, Legal Control of Press, 2d Ed. 1950, secs. 65-68;

Thayer, Fair Comment as Defense, Vol. 1950, No. 2 *Wis. Law Review*, p. 289;

62 *Harvard Law Review* 1207;

49 *Columbia Law Review* 875.”

The general rule of law on privileged criticism is set forth in *Restatement: Law of Torts*, sec. 606, p. 275, as follows:

“(1) Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory,

(a) is upon

(i) a true or privileged statement of fact, or

(ii) upon facts otherwise known or available to the recipient as a member of the public, and

(b) represents the actual opinion of the critic, and

(c) is not made solely for the purpose of causing harm to the other.

(2) Criticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or char-

acter affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of Subsection (1) and, in addition, is one which a man of reasonable intelligence and judgment might make.”

Again this court in the *Golden North Airways* case, *supra*, at page 628, quotes from *Howard v. Southern California Associated Newspapers*, 213 Pac.2d 399:

“Publications by which it is sought to convey pertinent information to the public in matters of public interest are permitted wide latitude. In controversies of a political nature, in particular, the circumstances often relieve statements, which might otherwise be actionable, of possible defamatory imputations. Mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon the public activities or fitness for office of individuals who are intimately connected with the principal object of the attack.”

CONCLUSION.

In conclusion we respectfully submit that the entire record shows the facts published were true. The setting up of the special ferry fund in the manner charged in the publications was shown by admissions and the uncontroverted evidence. This act of appellees showed a violation of the law on their part. The

law prescribes the same punishment for this violation as in the *Olson* case. The parallel mentioned in the publication to the *Olson* case was "*in the receipt and disbursement of public funds*". The parallel was complete. The comment, though perhaps appearing severe to appellees, was fair comment and the criticism was absolutely privileged as held by the great weight of authorities.

As shown by the record and pointed out hereinabove, the trial court took the position throughout the trial and repeatedly ruled, and instructed the jury:

1st. That to constitute a violation of the statute involved, namely, section 65-5-63, there must be actual theft or conversion of public funds to the personal use of appellees;

2nd. That truth is not a defense in a libel suit unless it is known to defendant at the time of the publication, and that proof of its discovery afterward may not be received in evidence;

3rd. That the principal is not criminally liable for criminal acts of an agent, even where the appointment is unlawful, unless the principal actually participates in or profits by the agent's acts;

4th. That deposit of funds in a checking account did not constitute a loan within the meaning of the statute (section 65-5-63, A.C.L.A. 1949); and

5th. That all evidence of loss of public funds was immaterial and inadmissible.

Since the facts are either admitted or established by the uncontroverted evidence, showing diversion

of public funds, a refusal to deposit them as required by law, loans to the bank and to Coughlin and Homer, and the loss of funds as shown by the Arthur Anderson report (Defendant's Exhibit E), a complete parallel to the *Oscar Olson* case in the receipt and disbursement of public funds was fully established, and since the criticism of the acts of appellees was privileged, and the comment fair, the trial court should have dismissed the amended complaints or instructed a verdict for appellant.

Therefore, it is respectfully requested that the judgment be reversed and the cases remanded to the District Court with instructions to dismiss each of the amended complaints, and that costs be awarded appellant in both courts.

Dated, ^{Juneau}~~Anchorage~~, Alaska,
June 25, 1956.

Respectfully submitted,
H. L. FAULKNER,
Attorney for Appellant.

(Appendix A Follows.)

Appendix.

Appendix A

ALASKA COMPILED LAWS ANNO. 1949.

§ 7 1-9. Embezzlement: Penalty. If the Treasurer of the Territory of Alaska, or any person exercising the duties of that office, shall fail, neglect or refuse, to account for or pay over, all moneys in his hands as said Treasurer in accordance with law, or shall unlawfully convert to his own use in any manner whatever, or to the use of another not lawfully entitled thereto, or use by way of investment in any kind of property, or loan without authority of law, any portion of the public money intrusted to him for safe keeping, transfer or disbursement, or unlawfully convert to his own use, or to the use of another not entitled thereto, money or other property which may come into his hands by virtue of his office he shall be deemed guilty of the embezzlement of so much of the money or property as is thus taken, converted, invested, used, loaned, or unaccounted for, and upon conviction thereof he shall be subject to the same punishment as is otherwise provided in the laws of Alaska for the crime of embezzlement. (L 1929, ch 118, § 19, p 291, effective May 2, 1929; CLA 1933, § 3192.)

No. 15,052

United States Court of Appeals
For the Ninth Circuit

EMPIRE PRINTING COMPANY,
a corporation,

Appellant,

vs.

HENRY RODEN, et al.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLEES.

BUELL A. NESBETT,

P. O. Box 2257, Anchorage, Alaska,

Attorney for Appellees.

FILED

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PAUL P. O'BRIEN, CLERK

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is a consolidation of three separate civil suits for libel commenced by Gruening, Roden and Metcalf and based on a publication of the Daily Alaska Empire on September 25, 1952.

As of that date the plaintiff Ernest Gruening was Governor of Alaska, the plaintiff Henry Roden was the elected Treasurer of Alaska (Tr. 407) and the plaintiff Frank Metcalf was the elected Highway Engineer of Alaska (Tr. 331).

The plaintiff Gruening, after completing college, entered newspaper work in Boston and in time served

as editor of the Boston Traveler, The Boston Journal, the New York Post, the New York Tribune and the New York Nation, had written and published a book on Mexico in 1928, acted as adviser to the U. S. Delegation at the Seventh Inter-American Conference (Pan American Conference) in 1933 after which service he was appointed Director of the Division of Territories and Island Possessions, Department of the Interior, in which capacity he served for five years before being appointed Governor of Alaska in December of 1939. Governor Gruening had been unanimously confirmed by the U. S. Senate for the position of Governor of Alaska three times and had held this position for approximately thirteen years when the September 25, 1952 edition of The Daily Alaska Empire was published (Tr. 143-145). As Governor of Alaska, Gruening was automatically a member of the Territorial Board of Road Commissioners, as well as of many other territorial boards (Tr. 146) and commissions.

The plaintiff, Frank A. Metcalf, after obtaining a master's degree in civil engineering, was engaged for a time as civil engineer in the State of Washington before coming to Alaska in 1910 where he established his own engineering service, practicing his profession throughout Alaska for thirty-seven years until appointed to fill an unexpired term as Territorial Highway Engineer in 1947, to which position he was elected in 1948. Metcalf had filed for re-election to the office of Highway Engineer after serving his first elective term and the election was to occur in October of 1952,

slightly less than two weeks after the September 25th issue of the Daily Alaska Empire was published. Metcalf had received over fifteen hundred more votes than his political opponent in the primary election in April of 1952, but was defeated by 621 votes in the general election of 1952, which election followed the above mentioned publication by a matter of less than two weeks (Tr. 330-333). At the time of the publication Metcalf was 73 years of age and had resided in Alaska 43 years (Tr. 359).

The plaintiff, Henry Roden, came to Alaska in 1897, engaged in prospecting and mining for five or six years while studying law, was admitted to the practice of law in 1906, served as Assistant U. S. Attorney in the Interior of Alaska, was elected to serve in the Senate of the First Territorial Legislature in 1912, continued to practice law in Fairbanks and along the Yukon River settlements until 1920 when he moved to Juneau, Alaska. He was re-elected to the Territorial Senate in 1935, 1937, 1939, and served as President of the Territorial Senate in 1941. He was elected Territorial Attorney General in 1941, and after serving the four year term returned to the private practice of law until appointed to serve the balance of the unexpired term of Territorial Treasurer Oscar Olson in 1950. Olson had been sent to prison for embezzlement of Territorial funds. In 1950 Roden ran without opposition in either party and was elected Territorial Treasurer. The plaintiff Roden was 78 years of age, had resided in Alaska 55 years and was serving as Territorial Treasurer when the September 25th, 1952

issue of the Daily Alaska Empire was published. As Treasurer he was automatically a member of the Territorial Board of Road Commissioners, which board was composed of the Governor, Highway Engineer, and Treasurer (Tr. 405-407).

One Oscar Olson was Treasurer of the Territory of Alaska until removed from office in May of 1949, later pleading guilty to two counts of embezzlement of public funds. The plaintiff Roden was appointed to serve the unexpired term as Treasurer of the Territory (Tr. 408). At the time of publication of the September 25th issue of The Daily Alaska Empire, Oscar Olson was confined in McNeil's Island Penitentiary serving the sentence imposed upon him for embezzlement of public funds.

The defendant, Empire Printing Company was an Alaska corporation and owner of The Daily Alaska Empire, the only daily newspaper published in Juneau, the capital of Alaska (Tr. 161). All of the outstanding stock in the Empire Printing Company with the exception of one share was owned by Helen Monsen, daughter of former Governor of Alaska, John Troy, and her sister, Dorothy Lingo (Tr. 557). H. L. Faulkner, attorney for appellant herein was the owner of one share of stock. Helen Monsen was President of the Empire Printing Company on September 25, 1952 (Tr. 554) and publisher and manager of its daily newspaper, The Daily Alaska Empire (Tr. 557, 571).

John Troy was replaced as Governor of the Territory of Alaska by the plaintiff, Ernest Gruening (Tr.

145). During the last years of the period of administration of John Troy he was personally assisted by Helen Monsen, his daughter (Tr. 536).

The editorial policy of The Daily Alaska Empire toward the plaintiff Ernest Gruening and his administration as Governor was not unfriendly until approximately 1941 (Tr. 561) when the policy changed to one of outright and gradually increasing hostility (Tr. 227, 194-195, 162).

The hostility of the newspaper toward the plaintiff Gruening and his administration was evidenced at first by the intentional omission of Gruening's name from all editorials and news dispatches (Tr. 188-189, 166-169) and by the practice of editing official statements submitted by Governor Gruening's office for the use of the press (Tr. 191).

The attitude of Helen Monsen, publisher of The Daily Alaska Empire toward the plaintiff Ernest Gruening and his administration was one of deep hatred, which almost bordered on psychosis. The attitude of James Beard, Managing Editor of The Daily Alaska Empire, toward the plaintiff Gruening and his administration was not as intense as that of Helen Monsen, but paralleled it in a modified way (Tr. 316-317).

For some time prior to the month of May, 1951, certain Territorial agencies dedicated to the task of attracting tourists and others to the Territory had advertised extensively in the United States to the effect that motorists could drive from the highways linking Alaska with the United States to Juneau,

Alaska, and there connect with steamers plying the Inside Passage back to the United States by ferrying their automobiles at nominal cost from the highway terminus at Haines, Alaska, to Juneau, Alaska, sixty-five miles, and via Alaska Steamship Company to Ketchikan, Alaska, thence back to the United States (Tr. 335). Prior to May of 1951 the ferry, "Chilkoot", plying between Haines and Juneau, had been under private ownership. In May of 1951 the private owner informed officials of the Territory that they could no longer operate at a profit because of the stringency and expense of complying with Coast Guard requirements and advised that they did not intend to operate the ferry which closed the sixty-five mile water gap between Juneau and the highways of Alaska and the United States during the 1951 season (Tr. 349).

Already faced with a large backlog of automobiles and freight waiting at Haines to be transported to Juneau, in reliance upon previous advertising, the Territorial Board of Road Commissioners met and voted to purchase the ferry "Chilkoot" from the private owners and operate it as a part of the Territorial Road System. Throughout the season of 1951 the ferry was operated under the direction of the Territorial Board of Road Commissioners and Highway Engineer Metcalf in particular. Operating expenses of the ferry were paid out of the Motor Fuels Tax Fund which was earmarked by the Legislature for roads, harbors, etc. Disbursements to cover operating expenses of the ferry in 1951 were made by voucher

approved by the Territorial Auditor and eventually paid by the Territorial Treasurer. Since the processing of a given voucher to payment required considerable time (several weeks on occasion), inconvenience and confusion resulted. The inconvenience and confusion was caused by the necessity of paying longshoremen at each terminus as soon as their work was completed, Federal law requiring payment of wages due crew members immediately upon their termination or discharge, and cash payment on C.O.D. freight carried by the ferry (Tr. 348). A further objection to the voucher system was that all receipts from the operation of the "Chilkoot" went to the Treasurer and into the General Fund of the territory, but all expenses of operation came out of the Motor Fuel Tax Fund, thus reducing the earmarked highway fund out of all proportion to the actual net cost of operating the ferry (Tr. 337, 345-346). Shortly prior to the commencement of the 1952 traffic season and on June 5th, 1952, the Territorial Board of Road Commissioners met to devise a procedure for handling the funds which would permit receipts from the operation of the ferry "Chilkoot" to be used to pay the expenses of the ferry thus avoiding the inconvenience, confusion and delay resulting from attempting to use the voucher system. It was imperative that many of the expenses connected with the ferrying of automobiles and freight between Juneau and Haines, Alaska, be paid immediately. Attempting to handle the above items by the voucher system was impracticable (Tr. 349). At the June 5th meeting of the Territorial Board of Road Commission-

ers, with all members of the Board and the Attorney General of the Territory present, the above mentioned problems were discussed and the minutes of the meeting show that the board unanimously approved the method of disbursement subsequently followed. This method consisted of establishing a bank account in the B. M. Behrends Bank of Juneau known as "Chilkoot Ferry", the only person authorized to draw checks on the said account being the purser, Robert E. Coughlin (Tr. 353). Coughlin reported weekly to the office of Highway Engineer Metcalf in connection with his operation. The Auditor of the Territory, one Neil Moore, was requested by Highway Engineer Metcalf to set up a bookkeeping system to handle the accounts and regularly audit the books in connection with the operation of the ferry, but refused (Tr. 354). After Auditor Moore's refusal Metcalf employed a certified public accountant in Juneau, one Chris Ehrendreich, to make a monthly audit of the accounts of the "Chilkoot" purser, Robert E. Coughlin. Ehrendreich made no complaints to Metcalf as to the method set up for handling the funds nor was any shortage ever mentioned to the plaintiff Metcalf. No shortage of funds ever occurred (Defendant's Exhibit C, Tr. 400) (Tr. 421, 422, 399, 400). The "Chilkoot" fund had been in existence and actually known to Auditor Moore for approximately three and one-half months before the publication complained of in this suit (Tr. 361). Although Moore was of the same political affiliation as the plaintiffs he admittedly had "no love" for the Gruening Administration (Tr. 284).

In their amended complaints, the plaintiffs alleged that prior to the September 25, 1952 issue of The Daily Alaska Empire this newspaper had conducted a campaign of misrepresentation, falsehood and calumny against the plaintiff Gruening intended to discredit and disgrace him and his administration of the affairs of the Territory of Alaska (Tr. 11-12).

In addition to deliberately deleting Governor Gruening's name from news dispatches and editorials and editing press releases from the Governor's office, evidence of the following Empire publications was introduced during the trial in support of the above allegation:

(a) The printing of a wholly false affidavit of a convicted felon which was intended to show that the plaintiff Gruening had attempted to influence the affiant's vote; that publication of said affidavit was made without asking Governor Gruening for his comments (Tr. 172-74).

(b) Of printing an editorial on May 25, 1951, entitled "Governor's Trip" discussing the visit of Governor Earl Warren of California to Alaska and his trip to Fairbanks, Alaska with Governor Gruening, inferring that Governor Warren was "Trapped" into making a speech in favor of statehood by Governor Gruening, an ardent supporter of statehood for Alaska, and concluding, "The rest of Alaska must surely be bowing low in humble apology today for the untoward action of its Governor" (Tr. 176, 577-578, 632).

(c) Of printing an editorial on April 15, 1952, entitled "R. E. (Anything for a Laugh) Sheldon", referring to the candidacy of Sheldon for the position of Territorial Auditor (against Neil Moore) as being an act "To help Gruening keep his gang together in spite of decent democrats" (Tr. 176, 580).

(d) Of printing an editorial on April 14, 1952, entitled, "The J-J Clambake" referring to a candidate as a "Gruening Creature" and to a talk by Governor Gruening in such words as "His Excellency, as he was affectionately addressed, brayed happily about the successes enjoyed by the Truman Administration . . ." (Tr. 176-177).

(e) Of printing an editorial on September 13, 1951, entitled, "Another Stab in the Back", stating that Ananias was a piker (compared to Gruening) and referring to Gruening as "Alaska's Little Caesar" (Tr. 177).

(f) Of printing an editorial on March 15, 1952 referring to Governor Gruening as "Alibi Ernie".

(g) Of printing an editorial on July 9, 1952, entitled, "The Artful Dodger", stating in part, "Agile Ernie, the artful dodger, again managed to sidestep comments on the notorious Palmer Airport Deal", comparing the plaintiff Gruening with a notorious pickpocket of fiction (Tr. 585).

(h) Of printing an editorial on September 11th, 1952 (two weeks before the publication of September 25th) entitled "And Pays, and Pays and Pays", "Alaska's Footloose Governor, probably the most

traveled man ever to sign an expense voucher, will take off again this week for a junket across the Territory", plaintiffs' Exhibit 2 (Tr. 586-587).

These editorials were considered to be fair comment by the publisher and reflected the attitude of the Daily Alaska Empire toward Gruening's administration (Tr. 588).

The issue of the Daily Alaska Empire of September 25, 1952, devoted almost the entire front page to the so-called "Special Ferry Fund" hereinbefore described. A copy of the front page of this issue was introduced into evidence as plaintiffs' Exhibit 1, is available to the Court, but was not duplicated in layout in the transcript of record.

In this issue appeared a full length eight column headline across the top of the front page in large black type 11¼" high reading, "BARE 'SPECIAL' FERRY FUND".

Immediately below this headline and to the left appeared a sub-heading 5/8" high and five columns wide reading, "REEVE RAPS GRAFT, CORRUPTION". The sub-headline dealt entirely with a one column political item on the extreme left hand side of the page concerning a campaign speech of Robert Reeve, a candidate for election to the office of Delegate to Congress, and extended four columns to the right and immediately over a reproduction of a photostatic copy of a check drawn on the "Special Ferry Fund", the reproduction of the check being over a front page editorial two columns wide entitled, "START TALK-

ING BOYS", likewise dealing with the "Special Ferry Fund".

A sub-headline to the main headline, on the right hand side of the front page, three lines deep and in type $\frac{1}{2}$ " high stated, "GRUENING, METCALF, RODEN DIVERT 'CHILKOOT' CASH TO PRIVATE BANK ACCOUNT". Immediately below this sub-headline was another smaller sub-headline above the two column report on the fund and a picture of Neil Moore, who was credited in the news item following with having "uncovered" the existence of the fund.

Immediately to the left another full column was devoted to the fund under the headline "RODEN, METCALF SAY 'NOTHING CROOKED' HERE", with a picture of the plaintiff Metcalf.

The testimony at the trial was that the main headline was false in that the words "BARE" and "SPECIAL", used in connection with the fund, implied that information had been uncovered or discovered by the Auditor revealing a private and secret fund (containing public money) whereas, in fact, the existence of the fund had been known to the Auditor for over three months (Tr. 361); that the sub-headline "REEVE RAPS GRAFT, CORRUPTION" immediately over the reproduction of the photostatic copy of a ferry fund check inferred that the check had been discovered, was drawn on the secret private fund (containing public money) and was proof of graft and corruption (Tr. 156-157, 361-362, 410-411).

That the sub-headline, "GRUENING, METCALF, RODEN DIVERT 'CHILKOOT' CASH TO PRIVATE BANK ACCOUNT" was false in implying that the three plaintiffs had improperly and crookedly channeled public funds into their own private bank account or into a private account controlled by them (Tr. 158, 362, 412).

That the fourth paragraph of the lead story by Jack Daum stating, "The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island Penitentiary for violating the law in the receipt and disbursement of public funds", was false in implying that the plaintiffs had stolen or embezzled public money, as had Oscar Olson, (Tr. 158, 414), and that in fact the establishment and administration of the fund did not in any way parallel the actions of Oscar Olson (Tr. 414).

That the last paragraph of the front page editorial entitled, "START TALKING BOYS" reading "Oscar Olson sits today in his prison cell, dreaming of the days when he thought Territorial laws were only for the underlings", was not only a false statement of fact as to why Oscar Olson was sent to prison but again imputed to plaintiffs the commission of the crime of theft or embezzlement (Tr. 159).

The witness Jack D. Daum, according to his own testimony, discontinued his attendance at the University of Alaska in 1949. Prior to 1949 he had had some experience on high school and college newspaper publications and later in the publication of certain

newspapers sponsored by his employers. After leaving college he worked for the Fairbanks Daily News-Miner as a reporter and then for the Washington D.C. Times Herald for approximately one year, coming to The Daily Alaska Empire on September 9 or 10, 1952, after approximately *two years' experience* on daily newspapers. He had been employed on The Daily Alaska Empire approximately *thirteen days* as a reporter when the issue of September 25, 1952 was published (Tr. 439-441). Although Helen Monsen was publisher and manager of the newspaper and one James Beard was managing editor, reporter Jack D. Daum personally and unassisted laid out and caused to be published the entire front page of The Daily Alaska Empire on September 25th, 1952 (Tr. 529). Daum wrote the lead article, the front page editorial (Start Talking Boys), and caused the reproduction of the photostatic copy of a check to be published (Tr. 442). No person checked on Daum's efforts or offered him assistance in connection with this issue (Tr. 470). According to Daum's testimony Helen Monsen was only a reporter on The Daily Alaska Empire and never told him what or what not to publish (Tr. 443), that Helen Monsen and James Beard did not know that he had prepared the September 25th issue as it was published, that reporter Monsen had requested that he publish one of her articles on the front page of that issue, but that he, Daum, told her that she could not do so as he had already laid out the front page for that day and would therefore have to publish her article on page three or page five (Tr. 529).

The witness Jack E. McFarland was Managing Editor of the Daily Alaska Empire until August 9, 1952, when he quit because of the unreasonable attitude of the publisher Helen Monsen toward Gruening and his administration and the distorted, unethical procedures of the Daily Alaska Empire with respect to news reporting (Tr. 324-325; Tr. 256).

According to the testimony of John E. Small, then a reporter on the Daily Alaska Empire, (Tr. 239) Jack D. Daum and the Managing Editor James Beard were discussing the page proof make-up of the September 25th issue in the editorial offices on the evening of September 24th when Beard stated (referring to the page proof and Governor Gruening) "We have the S-O-B where we want him", or words to that effect.

On November 14, 1955, and before the commencement of the trial a Motion to Amend the Amended Complaints of Roden and Metcalf to request judgment for \$50,000.00 compensatory or general damages and \$50,000.00 as punitive damages in each case was granted by the Court without objection from the defendant. By inadvertence, the complaint of Metcalf was not interlined to conform to the motion to amend and was printed in the transcript as it read before amendment. This error is explained by the certification of J. W. Leivers, Clerk of the Court, on file herein.

The cases were consolidated for trial and the jury returned verdicts on November 21, 1955, in favor of

each plaintiff in the sum of One Dollar (\$1.00) as compensatory damages and Five Thousand Dollars (\$5,000.00) as punitive damages.

ARGUMENT.

Appellant has divided its argument into eleven subject headings from page 29 through 71 of its brief.

Appellee has arranged its argument to follow appellant's arrangement and uses the same subject heading title and number.

I.

IT WAS ERROR TO RULE AND TO INSTRUCT THE JURY THAT THE PUBLISHED ARTICLES WERE LIBELOUS PER SE.

On page 29 of its brief appellant quotes the *second paragraph* of the Court's Instruction No. 3 to argue that the Court erred in failing to state in said paragraph that the publication must have falsely imputed the commission of a crime.

The *first paragraph* of Instruction No. 3 commencing on page 96 of the transcript reads as follows:

"You are instructed that *any publication of false and unprivileged defamatory printing or writing* which tends to expose a person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence, or to disgrace him, or which tends to injure him in his reputation or business or occupation, when published of him maliciously, constitutes libel." (emphasis furnished).

The second paragraph of the same instruction commences as follows on page 97 of the transcript:

“You are further instructed that *any such publication* which imputes to the person referred to the commission of a crime. . . .” (emphasis furnished).

It is quite obvious if the two paragraphs of the instruction are read in context, that the Court in using the words, *any such publication*, in paragraph two of the instruction, referred back to the wording contained in paragraph one of the instruction to-wit: *Any publication of false and unprivileged defamatory printing or writing*.

In the second paragraph of its brief on page 29 appellant states:

“The Court does not say it is libelous per se to falsely impute the commission of a crime.”

It is submitted that this is exactly what the Court did say.

Appellant also argues on page 31 of its brief that the Court erred in refusing to give defendant's proposed Instruction No. 6 the first sentence of which reads as follows:

“You are instructed that there can be no dispute about the facts published with reference to a setting up of the Special Ferry Fund . . .”

While there may not have been serious dispute as to the facts there was a sharp difference of opinion as to whether the facts amounted to a violation of

the law, the great weight of the testimony however, being that there was no violation of the law.

The Attorney General of the Territory personally attended the meeting of the Board when the method of handling the fund was decided upon and acquiesced in the arrangement (Tr. 409).

The method of disbursement was proposed by the plaintiff, Roden, who was then Treasurer of the Territory and formerly Attorney General of the Territory (Tr. 409).

Roden's opinion of the legality of the fund is illustrated on page 413 of the transcript by the following answer:

“A. The money was put in this fund for a public purpose. It was put into the fund as a legal proposition, a proposition supported by the Attorney General . . .”

Again commencing at the bottom of page 416 of the transcript the following testimony was given by Roden:

“Q. Did the fact that, in what should have been a dignified editorial, the Empire referred to three of the highest officials of the Territory as ‘Boys’ strike you as a fair report or comment on the given situation?

A. I would not think so.

Q. In that editorial the statement is used that ‘the money,’ referring to the fund, ‘which should have gone into the general fund.’ Is that accurate, Mr. Roden?

A. No.

Q. Why?

A. The Attorney General was of the opinion that it was not necessary that it go into the general fund, and that was my opinion also.

Q. Your opinion was based upon a section of the Code dealing with the matter of monies received from licenses, taxes, fees, and other monies; was it not?

A. Other monies; yes; as it was fully explained in the communication by the Attorney General.

Q. In a rather lengthy opinion?

A. In a rather lengthy opinion given long before this transaction took place. I think that was given in December, 1951."

And then when cross-examined by counsel for defendant on this point Mr. Roden testified, as follows, commencing on page 422 of the transcript:

"Q. Now, how was this fund handled after Neil Moore went to the bank and told them to stop the payments out of the account?

A. The end of the season had come, and the Highway Engineer made another application to the Attorney General for his opinion, and the Attorney General repeated again that the special account was perfectly legal and could be paid out by the parties who put money into it. That was the opinion again of the Attorney General the second time.

Q. Now, let me ask you this. Isn't the Attorney General, you are talking of, Mr. Williams?

A. Yes.

Q. Didn't the Attorney General in October or September—I don't know the exact date but right after this publication—write an opinion in which

he said that the funds should be sent to the Treasurer and then sent to the Motor Fuel Tax Fund and paid out of there?

A. No, he didn't.

Q. He did not do that?

A. No.

Q. He didn't do that?

A. I know that opinion."

And again commencing on page 425 of the transcript with Mr. Roden being cross-examined by counsel for appellant the following transpired:

"A. Yes; the law sets up a method.

Q. And the law prescribes it should go into the Treasury, where there are Territorial funds?

A. Oh, no; not according to the opinion of the Attorney General, they shouldn't go in.

Q. Well, I know; but you are a lawyer yourself; and the Court is not bound by an opinion of the Attorney General. Doesn't the law prescribe the method by which public funds shall be handled?

A. Certain public funds, yes; but not all public funds.

Q. Well, but it says any public money or any money in which the Territory, or any funds in which the Territory or any county, municipality or subdivision has an interest?

A. No.

Q. Wouldn't that be public funds?

A. No. They need not go into the general fund, Mr. Faulkner. You are a lawyer also, and you know it.

Q. No; I didn't say the general fund. I mean to the Treasury.

A. No.

Q. It doesn't say that?

A. No. It happens every day.

Q. That it must be paid over to the Treasury?

A. Transactions that don't go through the Treasurer's Office happen every day pretty near.

Q. What is that?

A. Transactions where money is taken in by a public officer don't go through the Treasurer's Department at all.

Q. What is that?

A. What is that? Well, I will give you an example. For example, a delinquent father who has a child in a foster home, the Department of Welfare goes after him and says, 'Here, you have got to pay that foster home, say, fifty dollars a month.' Well, he hums and haws around for a while and he says, 'I will pay you that fifty dollars but I won't pay it to the foster home.' And the Welfare Department, they accept fifty dollars, and the Treasurer never knows it, and turns it over to the foster home. I will give you another illustration if you want me to. A man dies, and there is no money in his estate, and under the Social Security Law the Federal Government pays for the funeral. The Federal Government pays for the funeral to the parties who pay for it. The undertaker has no money to bury the man, and he says 'I must have money to buy the coffin.' All right; so the Welfare Department goes and says, 'All right. We will pay you; we will pay the man that paid for the funeral,' and then, when the money comes from the Federal Government, it doesn't go through the Treasurer's Office; it goes directly to the people to whom the Welfare Department advanced the money.

Q. Well, that is not hardly in the nature of public funds that——

A. It is in the same way it was with the ferry fund; it was not public money in the sense that it had to go through the Treasurer's Office.

Q. Of course this is more or less argument. What authority did the Board of Road Commissioners have in the first place to purchase the Chilkoot Ferry and to operate it?

Mr. Nesbett. Now, your Honor, I didn't go into that.

The Court. I had understood that there was no question about the authority of the Board to purchase this ferry."

The Court then carefully explains in Instruction No. 4 (Tr. 99) that the defendant's contention was that the violation of law referred to in the publications was only to the unlawful receipt and disbursement of public funds, which it claimed was true. In Instruction No. 5 the Court quotes Sec. 65-5-63 ACLA, which defendant claimed had been violated, and instructed the jury that it was for them to decide whether or not there had been a violation (Tr. 103-104).

Appellant then apparently argues commencing on page 32 of his brief that the published articles were susceptible of more than one meaning and that the Court failed to advise the jury properly with respect to the parallel to the Oscar Olson case which defendant pleaded as a defense and relied in particular on the words "in the manner of the receipt and disbursement of public funds". It is submitted that

this matter was covered thoroughly by the Court in its Instruction No. 5 (Tr. 104) and is covered in detail in the following subject heading.

II.

IT WAS ERROR FOR THE COURT TO RULE AND INSTRUCT THAT UNLESS IT WAS SHOWN THE APPELLEES ACTUALLY CONVERTED TERRITORIAL FUNDS TO THEIR OWN USE, THEY HAD COMMITTED NO CRIME AND NO OFFENSE INVOLVING CRIMINAL PUNISHMENT.

Actually the Court did not make a ruling or give an instruction as claimed by the above quoted heading of appellant to this portion of its argument.

In order to obtain a full perspective of the Court's instructions on the point it is necessary to review a portion of the instructions in context.

Instruction No. 4 (Tr. 98), states that the references in the publication to the Oscar Olson case clearly impute a crime and the jury is so instructed. They are further instructed that legally it is presumed that malice existed and injury resulted. The jury was further instructed that if they found the statements to be true or that they were published without malice or were privileged they must find for the defendant (Tr. 99).

Instruction No. 4 goes on to state that the Court does not declare or intend to indicate to the jury whether the crime imputed a theft or misappropriation of public funds. The jury was instructed that the defendant denied there was any accusation of theft of

public funds or that any such accusation was intended and contends that the violation of law charged in the publications referred only to the unlawful receipt and disbursement of public funds which the defendants alleged to be true. The jury was told that this was a question for them to determine from the publications and in determining this question they should consider the words used in the publications in their ordinary accepted meaning.

In Instruction No. 5 (Tr. 100) the jury was instructed that the defendant sought to justify the comparison to the Oscar Olson case by the provisions of Section 65-5-63 and the instruction quotes that section of Alaska law in its entirety, which section defines all aspects of the crime of embezzlement of public funds. The instruction goes on to point out to the jury that Oscar Olson was convicted under Section 7-1-9 ACLA 1949, which particularly defines the crime of embezzlement by the Territorial Treasurer, but provides that the penalty shall be the same as that assessed by Section 65-5-63. In other words the jury is fully informed of the fact that Oscar Olson was convicted of embezzlement under one statute and sentenced under the penalty provisions of another statute.

On page 102 of the transcript the jury is then instructed in part, as follows:

“You are further instructed that *aside from the statutes above noted* (referring to Sections 7-1-9 and 65-5-63 ACLA) defining the crime of embezzlement of public funds, there is no statute in

Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution." (Emphasis furnished.)

In the same instruction commencing at the bottom of page 103 of the transcript the Court further instructs the jury in part, as follows:

"By this the Court does not intend to comment in any way as to whether or not the actions of the plaintiffs relating to the 'Chilkoot' ferry fund were or were not illegal, which is a matter for the jury, but it is the intention of this instruction only to declare to you the remedy in case there may exist any such illegality."

Then on page 104 of the transcript the Court places before the jury squarely the question of whether or not the method of disbursement employed in administering the Ferry fund was a parallel case to that of Oscar Olson, in words as follows:

"There remains to be considered by you the question of whether or not, as contended by the defendant, the 'device' used by the plaintiffs as members of the Board in depositing the funds from the operation of the ferry in a special account rather than paying such to the Territorial Treasurer, and in paying operating expenses of the ferry from such account, is a sufficient parallel with the case of Oscar Olson in setting up a special account as shown by the evidence to justify the publication as true. This is a question of fact for the jury to determine from a consideration of all of the evidence in the case."

On page 35 of its brief appellant quotes a part of Instruction No. 6 in italics for emphasis but fails to quote the last sentence. In order that it be considered in context with preceding and succeeding instructions the instruction in its entirety should be considered at this point in the argument:

No. 6

“You are further instructed that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defendant must show, to justify the truth of such publication, not only that the plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the auditor, but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to divert such to their own use. In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or to deprive the Territory thereof.”

At the bottom of page 35 and on page 36 of its brief appellant states that the Court erred in refusing to give defendant's proposed Instruction No. 7 and quotes Court's comment when it denied defendant's Instruction No. 7. It is submitted that the Court's offhand comment at the time Instruction No. 7 was

denied *does not amount to a holding nor does it amount to an instruction to the jury*. The statement was made out of the presence of the jury and the real test of the Court's holding will be found in reading the instructions as they were finally presented to the jurors. The foregoing outline of instructions given clearly outlines the Court's final thinking on these points and must be regarded to the complete exclusion of any off-hand comment the Court may have made at the time a proposed instruction was denied.

In the middle of page 36 of its brief, appellant purportedly quotes the comment of the Court when it denied defendant's proposed Instruction No. 6. It is submitted that appellant has not correctly quoted the Court, in fact has misquoted the Court to the extent that the entire comment of the Court is perverted to suit appellant's argument. The correct comment of the Court near the bottom of page 665 of the transcript reads as follows:

"However, the request that we instruct the jury that the actions of the plaintiffs, the Board of Road Commissioners, was a violation of these laws will be denied. *That*, again, is **not** for the Court to determine. There is dispute on the evidence. The defendant says they were. The plaintiffs, particularly Mr. Roden, say it was not. I am not going to decide that question. I leave it to the jury to decide." (Emphasis furnished.)

The Court plainly expressed and emphasized its intention (the exact opposite of that claimed by appellant) and carried out that intention with the proper instruction.

Oscar Olson, former Territorial Treasurer, was indicted and pleaded guilty to two counts charging him with embezzlement (Defendant's Exhibit J). Olson converted the money to his own use and was convicted under Section 7-1-9 ACLA 1949.

Paragraph IV of the lead article of the Empire on September 25, 1952, stated:

“The case closely parallels that of Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds.”

Olson did not violate the law in the “receipt” of public funds as Treasurer. His violation of the law with respect to the “disbursement” of public funds consisted of disbursing to himself and using the funds for his own purposes. This is commonly known as theft or stealing by the general public. The paragraph in its commonly understood meaning would be the equivalent of saying that the acts of the plaintiffs were very similar to those of Olson who was convicted of embezzling public funds and converting them to his own use and is now serving a prison term for that crime. The jury so found. The further implications of the publications are that the plaintiffs should and may very well be serving time themselves before the matter is ended.

Actually no factual proof was submitted at the trial which tended in any manner to prove that the cases were parallel, either in the method of receipt or disbursement. At least, the jury did not find a sufficient

parallel and the question was placed fairly before them.

The last paragraph of the front page editorial "START TALKING BOYS" stated:

"Oscar Olson sits today in his prison cell dreaming of the days when he thought Territorial laws were only for the underlings".

The plaintiffs after being abused editorially in the preceding fifteen paragraphs are again compared to Olson the admitted thief, who "sits today in his prison cell dreaming, etc."

The above statements were, in part, the basis of plaintiff's complaints. The effect of Instruction No. 6 (Tr. 104-105) was to state that in order to prove the truth of these statements defendant must prove that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use, just as Olson had done.

The truth would have been a defense to the specific libel the jury found had been committed. The jury also found defendant had failed to prove the truth.

Defendant's proposed instruction No. 7 (Tr. 66), denied by the Court, would have instructed the jury that the comparison with the Olson case had been established at the trial as a fact, that the plaintiffs had committed embezzlement and the publication was not libel. As worded the instruction would have amounted to a directed verdict leaving nothing to the jury and was properly refused.

Defendant's proposed Instruction No. 6 (Tr. 65) would have instructed the jury that it was undisputed that accountants and auditors had found a shortage of \$300.58 in the fund, that the accounts had been inaccurately kept and that it was impossible to ascertain from any source the exact status of the ferry fund. As a matter of fact defendant's own Exhibit C, Ehrendreich's audit, admitted over appellee's objection (Tr. 380) as a certified copy of a public record, prepared by a certified public accountant, stated as the concluding paragraph:

"In my opinion, the purser has satisfactorily accounted for all Territorial funds coming into his custody between June 25, 1951 and September 30, 1952—voyages No. 1 to No. 54, inclusive. Respectfully submitted, C. J. Ehrendreich" (Tr. 400).

Appellant cites the case *Dimmick v. United States*, 9th CCA 121 Fed. 538, 1903 as authority. In that case the Clerk of the Mint received money for old materials sold on December 14, 1900. He falsely entered the receipts on the records as having been received on January 3, 1901. Defendant admitted he had used the money and knew of the regulation (Rev. St. 5492) which required that he deposit the fund in the same quarter as received. The finding of guilty of embezzlement in the trial Court was upheld on the basis that the offense was a *willful and felonious* failure to comply with the specified requirements of the Secretary of the Treasury.

Sec. 65-5-63 ACLA, upon which defendant relies so heavily reads:

“That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town or corporation has an interest, and shall in any way *convert to his own use any portion thereof or shall loan*, with or without interest, any portion thereof, or *shall neglect or refuse to pay over any portion thereof as by law directed and required*, or when lawfully demanded to do so, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be.”

The italicized portions indicate the separate acts, each of which could constitute a separate offense. Appellant does not contend that a conversion was proved; the loan aspect is covered elsewhere in this argument, but apparently believes that plaintiffs *neglected or refused* to pay over funds and states at the bottom of page 36 of its brief:

“Nothing could be plainer than the fact that this is a crime under the provisions of Section 65-5-63 ACLA 1949.”

The only criticism of this argument is that the question was placed fully before the jury and it found that no such crime had been committed, or, if committed, was not a sufficient parallel with the Olson crime to constitute the defense of truth.

III.

THE COURT ERRED IN HOLDING AND INSTRUCTING THE JURY THAT UNDER THE STATUTES OF ALASKA THE APPELLEES WOULD NOT BE CRIMINALLY LIABLE FOR ILLEGAL ACTS OF THEIR AGENTS.

The appellant's title for this point plainly indicates that it believes the Court actually did instruct the jury that the plaintiffs would not be criminally liable for the illegal acts of their agents.

A careful search of the instructions given by the Court convinces the writer that *no such instruction was given by the Court.*

The Court, it is submitted, very properly denied defendant's proposed Instruction No. 27 which would have instructed the jury that it was admitted fact that the funds had been handled *as described in the publication.* The proposed instruction assumed to the jury that purser Coughlin was performing an illegal act in handling the funds and that Coughlin's illegal acts were those of plaintiffs. As submitted the instruction leaves nothing for the jury to find.

The Restatement of Agency, Vol. I, Sec. 19, does not read as cited by appellant on page 41, but rather provides, as follows:

“The *appointment* of an agent to do an act is *illegal* if an agreement to do such an act or the doing of the act itself would be criminal, tortious, or otherwise opposed to public policy.” (emphasis supplied).

Appellee has no argument with the authorities cited by appellant to the effect that in some instances a

principal may be held criminally for the act of an agent such as in the case of *U. S. v. Parfait Powder Puff Co.*, 163 F 2d 1008 where enforcement of the Pure Food and Drug Act was involved, nor with appellant's authorities to the effect that there might have been a sufficient "possession" or "control" of the funds in plaintiffs to satisfy that particular element of the crime of embezzlement.

But the Court clearly instructed the jury that defendant relied on having proved the truth of its libel by showing that plaintiffs had violated Section 65-5-63 "in the matter of receipt and disbursement of public funds" and left the question to the jury to determine whether plaintiffs had committed this statutory form of embezzlement and if so, whether it was a sufficient parallel to the Olson crime as to constitute the defense of truth.

Appellant ignores the fact that the crime imputed to the plaintiffs by the publication was that of embezzling public funds for their own use or gain, as had Oscar Olson. The commonly understood meaning of the publication was that plaintiffs had committed the crime themselves *and not through an agent*.

The balance of appellant's arguments under this point deal with the alleged loss of funds which appellees submit was immaterial to the trial of the case, but is covered elsewhere in this brief.

Appellant contends that this portion of his argument is sufficiently raised by specification of error Numbers 5 (Tr. 699) and 18. Appellees contend that

it is not. Rule 74(d) FRCP, Rule 18(2)(d) Rules of U. S. Court of Appeals for the Ninth Circuit.

IV.

THE COURT WAS WRONG IN STATING AND INSTRUCTING THE JURY THAT THE LAW PRESUMES THE PUBLICATION TO BE MALICIOUS.

The Court's action in refusing defendant's proposed Instruction No. 16, quoted in part, commencing on page 46 of appellant's brief, appears to be thoroughly correct. The instruction combines offerings regarding burden of proof (stated both positively and negatively) with respect to malice; preponderance of evidence; malice which avoids the privilege; a statement to the jury that plaintiffs had failed to allege in their complaints that defendant *did not believe the statements to be true*; presumption of good faith and negligence. The proposed instruction appears to have no logical beginning or coherent end to the extent that it could be used as a guide to the jury in applying the law to the facts in this case. All of these matters were coherently covered in various of the Court's instructions, where applicable.

On page 47 of its brief appellant states: "We have no law in Alaska covering civil actions for libel", apparently meaning statutes with respect to civil actions for libel, and implied malice in particular.

While there is no statutory law on that point, the case of *Vigni v. Lisianski Packing Co.*, 6 Alaska 182

(1919) plainly adopts and applies the principle of malice implied in law.

V.

IT WAS ERROR TO HOLD, RULE, AND INSTRUCT THE JURY THAT TRUTH IS NOT A DEFENSE UNLESS KNOWN AT THE TIME.

Appellant's title for this point is quoted above verbatim. Appellant clearly believes the Court instructed the jury that truth is not a defense unless known at the time of publication of the libel.

No such instruction was given by the Court (Tr. 91-117).

The writer has searched diligently and can find nothing in the records to substantiate appellant's claim that the Court *held* and *ruled* that truth is not a defense unless known at the time.

The exchange of remarks between the Court and counsel reported from the transcript of the record by appellant in its brief commencing at the bottom of page 51 was immediately preceded by the following (Tr. 607):

“Mr. Faulkner. I will state—this case concerns the funds of the Chilkoot Ferry and the way they were handled. *The purpose of offering these checks is to show that, to show that Mr. Homer was the agent and that he collected revenue and transmitted that revenue to the Chilkoot Ferry, to Mr. Coughlin, as purser, and to show the disposition of the checks.* Now, I will state

to the Court, that is, the first list of checks I have here will show by their endorsement that they went into the special ferry account which is the subject of this suit (emphasis supplied).

The Court. Is there any dispute—

Mr. Faulkner. Just a minute, Your Honor . . .”

The stated purpose of offering the checks was to show that Mr. Homer (an employee of Coughlin) was agent to collect and transmit revenue to Coughlin, and that some checks so transmitted (conceivably) did not go into the ferry fund.

The Court's remarks at the bottom of page 607 and at the top of page 608 of the transcript were understandably those of query as to how counsel for defendant could possibly connect the acts ^{of an agent} of an agent up (assuming such was the relationship for the moment (Tr. 605)) with the plain imputation in the publication that the plaintiffs themselves had committed the same crime as Oscar Olson.

Appellant claims that error was committed in refusing to instruct the jury in part (page 50 of appellant's brief):

“It is also undisputed that the certified public accountants and auditors . . . found discrepancies . . . and a shortage of \$300.58 . . .” when as a matter of fact the undisputed testimony was that there was not a shortage in the account. See defendant's own Exhibit C, last paragraph, admitted over appellee's objection (Tr. 400) which reads as follows:

“In my opinion, the Purser has satisfactorily accounted for all Territorial funds coming into his

custody between June 25, 1951, and Sept. 30, 1952—Voyages # 1 to # 54, inclusive. Respectfully submitted, C. J. Ehrendreich.”

See also the Arthur Anderson audit, Defendant’s Exhibit E and the testimony of Henry Roden on page 419 of the transcript as follows:

“Q. Did you know that any shortage purportedly or might have existed?

A. I was positive there was no shortage.”

and again on page 421 of the transcript as follows (Cross-examination of Roden by counsel for defendant):

“A. According to the last audit made on March 15, 1953, by the Arthur Anderson Company, I presume they had all the checks and all the records present. At that time they said it was three hundred and some cents short.

Q. Three hundred dollars?

A. I think it was three hundred dollars and some cents long.

That is the way that report reads, long not short.”

Defendant’s proposed Instruction No. 22 (page 51 Appellant’s Brief) was properly denied. The first sentence reading:

“You are instructed that in all libel cases, the truth of facts published is a complete defense.”

is a correct statement of the law and was thoroughly covered in the Court’s instructions. The second sentence reading:

“Motive and purpose are immaterial.”

is misleading as a complete statement of the law because motive and purpose *are material* unless the truth has been proved, and proof of the truth must amount to proof of "*The truth of whatever charges were made*". *Borg v. Boas*, 9th CCA, 231 Fed 2d 788, 792 Hn-1. In this case, proof that plaintiffs had committed the crime of embezzlement in the manner implied. The last sentence reading :

"If the charges are true, it doesn't matter whether defendant knew at the time the facts were published they were true, but discovered that afterwards, for the truth whenever discovered is a complete defense."

had no place in the instructions. The plaintiffs never at any time claimed that the truth, to be a defense, must have been known to the defendant at the time of publication. Defendant had repeatedly conceded there was no personal conversion and was relying on having proved the truth, a violation of the law "in the matter of the receipt and disbursement of public funds." The remarks of the Court quoted by appellant were made out of the presence of the jury. The giving of this portion of the instruction could only have confused the jury.

It is submitted that the Court covered the matter of truth as a defense in its Instruction No. 4 commencing on page 98 of the transcript.

VI.

IT WAS ERROR TO SUBMIT TO THE JURY FOR ITS CONSIDERATION HEADLINE ENTITLED "REEVE RAPS GRAFT, CORRUPTION".

Concededly, if a reader took the time to read the news article to which the headline actually referred, it would become apparent that the headline had no connection with the ferry fund.

On the other hand, a reader's first perusal of the black print headlines in the natural sequence of reading plaintiff's Exhibit 1 (not printed but available to the Court) could very well create the following first and lasting impressions:

- (a) A special secret ferry fund had been discovered. (Main headline)
- (b) Gruening, Metcalf and Roden had been diverting the Chilkoot cash to their private accounts (right hand subheadline)
- (c) Although the evidence is all against them, Roden and Metcalf deny anything "crooked" about the discovered fund and their diversions.
- (d) One of the fund checks had somehow been obtained (and reproduced on the front page) and Auditor Moore had the "goods" on Gruening, Metcalf and Roden.
- (e) Reeve is highly critical of such graft and corruption (Left hand subheadline over photostat of check).

Whether this would be the natural conclusion of the reader is, of course, for the jury to determine and

the Court very properly said in Instruction No. 4, in part, as follows (Tr. 99) :

“The Court does not here declare or intend to indicate to you whether or not the crime charged, imputed to the plaintiffs, the wrongful *theft or misappropriation* of public funds. The plaintiffs alleged that such words, together with other references to the Oscar Olson case, and imputations of graft and corruption, impute to them the crime of embezzlement as that crime is commonly understood, that is, the wrongful conversion of public funds entrusted to plaintiffs to their own use, which accusation is admittedly untrue. The defendant denies that there was any accusation of theft of public funds, or any such imputation intended, and contends that the violation of law charged referred only to unlawful receipt and disbursement of public funds, which it alleges to be true. This is a question of fact for the jury to determine, from a consideration of all of the evidence in the case, and *from a careful consideration of the publications in their entirety, including headlines, and any reasonable imputations or deductions arising therefrom.*”

Nothing in such an instruction would permit the jury “to wrench a word or phrase of an article out of context” and base a finding thereon, as argued by appellant.

VII.

IT WAS ERROR TO REFUSE TO INSTRUCT THE JURY TO TAKE INTO CONSIDERATION THE LOSS OF THE CANCELLED CHECKS ON THE FERRY FUND.

The plaintiff, Ernest Gruening, went out of office as Governor of the Territory on the 10th day of April, 1953 (Tr. 145), the plaintiff, Henry Roden, went out of office as Territorial Treasurer on the 1st day of April, 1955, and the plaintiff, Metcalf, went out of office as Territorial Highway Engineer in April, 1953 (Tr. 332).

On the 18th day of October, 1955, the defendant served upon each of the plaintiffs a demand that they produce the cancelled checks involved in the administration of the so-called Ferry fund. This demand was served on the plaintiffs Gruening and Metcalf more than two years and six months after either of them had held Territorial office and might rightfully have had access to Territorial records. None of the plaintiffs was able to comply with the demand and the Court was so informed.

At the trial of the case counsel for the defendants insisted upon introducing in evidence Defendant's Exhibits F, G, H and I, all of which were certificates executed by the Territorial Treasurer, Territorial Highway Engineer and Territorial Director of Finance to the effect that none of the checks involved in the administration of the so-called Ferry fund was in their custody. All certificates were dated October 26, 1955, two years and six months after Gruening and Metcalf had held Territorial office and

six months after Roden went out of office. Counsel for defendants at the trial likewise insisted upon introducing the deposition of Minnie Coughlin which deposition merely stated that the deponent was unable to find any of the cancelled checks involved in the administration of the so-called Ferry fund.

The efforts of counsel for the defendant in making the above mentioned demands and introducing the exhibits at the trial appears to have been a studied attempt to create in the minds of the jury the thought that the plaintiffs were at the time of the demands responsible for the proper custody of the cancelled checks, were ordered to produce them and failed in their duty.

Defendant's proposed Instruction No. 18, cited verbatim on page 60 of appellant's brief, appears to bear out this analysis. The instruction was properly refused by the Court.

To instruct the jury that plaintiffs had not produced the records of the Ferry fund would inevitably have caused the jury to assume that plaintiffs had the obligation to produce them, even though they were kept in the custody of the proper territorial officials and in spite of the fact that none of the plaintiffs had held public office for a long period prior to the time the demands were made to produce. The demands were made less than one month before the trial date.

That sentence of the proposed instruction reading:

“It was the duty of the plaintiffs to have seen that these checks, other instruments and bank statements were filed in the proper office and you

are instructed that if any person having custody of any public records, books, paper or writing shall willfully destroy, secrete or mutilate the same, he is guilty of a crime and liable to punishment under the provisions of Section 65-7-21, ACLA 1949.”

is ridiculous. The plain and obvious intent of the entire proposed instruction was to confuse the jury with a collateral issue, that of whether the plaintiffs and all of them had failed miserably in carrying out their duty to produce certain official records for which they were responsible and apparently had willfully destroyed, secreted or mutilated, thus committing still another crime under Territorial law.

VIII.

IT WAS ERROR TO HOLD THAT DEPOSIT OF MONEY IN A CHECKING ACCOUNT IN A BANK DOES NOT CONSTITUTE A LOAN.

Appellant's contention in connection with this point is that the plaintiffs were guilty of that portion of Section 65-5-63 ACLA 1949 providing that if any person shall receive any money belonging to the Territory and “shall loan, with or without interest, any portion thereof, . . .” he is guilty of embezzlement of public money and that in arranging for receipts from the operation of the ferry Chilkoot to be deposited in a bank account known as “Chilkoot Ferry Fund” the plaintiffs in effect loaned Territorial funds.

Appellant continually ignores the fact that Oscar Olson pleaded guilty to two counts charging him with converting Territorial funds to his own use in violation of Section 7-1-9 ACLA 1949 and that he was sentenced to serve ten years in prison for this violation under the penalty provisions of Section 65-5-63 ACLA 1949 *only*.

Oscar Olson was not charged with a crime for having loaned Territorial funds and the publications complained of mentioned nothing in connection with the loan of Territorial funds. The crime imputed to the plaintiffs was that of embezzlement and diverting to their own use.

In *United States Fidelity and Guaranty Company v. Carter* (Va. S. C. of Appeals, 1933), 170 SE 764, 90 ALR 191, the Court held that a State statute *declaring* it to be malfeasance for a Treasurer to lend public money was not violated in that case and said in headnote 7: "While there is no express statutory provision authorizing a county treasurer to deposit public funds in his hands in a bank to his credit as Treasurer, he commits no misdeed or malfeasance and is guilty of no wrong in so doing, provided he has acted in good faith and with due care. It is not only permissible for him to do so, but under modern business conditions he should do so."

It is conceded that the general legal effect of a deposit of funds in a bank is held to create the relationship of debtor and creditor between the bank and the depositor. The deposit in legal effect amounts to a loan to the bank. However, the Courts have con-

sistently held that the deposit of public funds in a bank by a public trustee is not a loan in the sense that the trustee is misusing funds belonging to the public. Appellant cites the case of *New York County Bank v. Massey*, 192 US 133, 135. This case merely decided that the deposit of a bankrupt made while insolvent was a loan to the bank and could be set off by the bank against debts owed the bank by bankrupt under Section 68(a) of the Bankruptcy Act permitting setoffs in cases of mutual debts. It has no application to the facts in this case even assuming that the question of whether plaintiffs had made a loan was relevant and could be proved as a violation of territorial law and therefore a defense to the libel.

Appellant cites *Bramwell v. USF&G* (CCA 9th, 1924), 299 Fed 705, which case merely held that a deposit of trust funds for Indians in an insolvent bank constituted a "debt due the United States" within the meaning of a Federal statute giving priority to debts due the United States in cases of insolvency and likewise has no application to this case.

It is submitted that the proper rule to be applied in the situation advanced by appellant, assuming that it was relevant to this case, would be that set out in the case of *Schumacher v. Eastern Bank & Trust Company* (CCA 4th, 1931), 52 Fed 2d 925. In that case the Court said on page 926 (second column):

"Equity regards substance and not form, and is not bound by the names which parties may have given to their transaction. While the legal effect of a deposit is a loan to the bank, so that

the relations of debtor and creditor is created between the bank and the depositor (New York County National Bank v. Massey, 192 US 138, 24 S Ct 199, 48 L Ed 380), there is a distinction between a loan and a deposit as these words are used in common parlance: A loan is primarily for the benefit of the bank; a deposit is primarily for the benefit of the depositor. A loan is not subject to checks, a deposit ordinarily is. A loan usually arises from the necessities of the borrowing bank; a deposit, from the confidence of the depositor in its strength. A loan ordinarily is sought by the bank for its own purposes; a deposit is ordinarily made by the depositor for purposes of its own."

IX.

THE ADMISSION OF THE PURPORTED COPY OF THE FRED MCGINNIS LETTER WAS PREJUDICIAL ERROR.

The letter referred to above read as follows (Tr. 186):

"Juneau Methodist Church
Fred McGinnis, Minister
Juneau, Alaska

November 7, 1952

Open Letter to Editor of Empire.
Editor, Daily Alaska Empire
Juneau, Alaska

Dear Sir:

In order to be candid and honest in reacting to your paper's policies with regard to your edi-

torials and other articles, I would like to express to you the following:

1. Your editorials generally are the poorest and worst written of any this citizen has ever seen in any newspaper anywhere, barring none.

2. Your editorials seem to be dedicated to causing the public to 'feel the worse' toward our Governor and a few other men. It seemed to me that you tried to cause the public to think of the Governor as a dishonest, mis-appropriating, unworthy man. You succeeded as far as I was concerned until other information threw different light on certain policies.

6. Your editorial of November 6th, in which you by implication invite the Governor to leave the Territory, was to my mind the lowest, cheapest and most unworthy type of editorial. * * *"

The letter was offered and admitted for the purpose of showing the reaction of the individual writer to the articles published by the Daily Alaska Empire (Tr. 186).

Counsel for appellant at the time admitted that the letter had already been published in the Daily Alaska Empire, together with a letter criticizing it and still another follow-up letter of criticism (Tr. 187).

All of the prejudice and harm that appellant argues resulted from the introduction of a portion of the letter would appear to be more than refuted by the acts of defendant in publishing the letter in its newspaper, along with letters to the contra opinion.

X.

THE METCALF CASE.

Appellant contends that error was committed in instructing the jury that if they found the facts warranted they could award exemplary or punitive damages to each of the plaintiffs (including Metcalf) even though Metcalf's complaint did not ask for punitive damages and submits that this point was raised by appellant's specifications of error Nos. 20 and 21.

Appellant admits in its brief that counsel for appellees asked leave of the Court at the beginning of the trial to amend the complaints of Roden and Metcalf to ask for punitive damages in both cases but claims that only Roden's complaint was so amended. Actually, both complaints were ordered amended by the Court and were so amended insofar as this appeal is concerned.

The certificate of J. W. Leivers, Clerk of the District Court, and the Reporter's Transcript of Ruling of the Court on Plaintiff's Motion to Amend, November 14, 1955, filed with Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit, on July 30, 1956, shows that a written motion to amend the complaints of Roden and Metcalf was filed on November 14, 1955, prior to trial, reading as follows:

"The plaintiffs, Henry Roden and Frank A. Metcalf move to amend their complaints in causes No. 6725-A and 6727-A by substituting in the last sentence of Paragraph VIII the words 'Fifty Thousand (\$50,000.00) Dollars' in lieu of the

words 'One Hundred Thousand (\$100,000.00) Dollars' and by striking the prayers in said complaint and substituting therefor a prayer reading as follows: 'Wherefore, plaintiff prays judgment against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) as compensatory or general damages and the sum of Fifty Thousand Dollars (\$50,000.00) Dollars as punitive or exemplary damages and for costs and a reasonable attorney's fee.'

That counsel for appellant stated that he had no objection to the granting of the motion and suggested that the amendment should be indicated on the pleadings by interlineation.

That the Court stated:

"Plaintiffs Roden and Metcalf were allowed to amend Paragraphs VIII of their complaint by interlineation."

That the Court files were on the Judge's desk at the time and that the Judge personally interlined the amendment on Roden's complaint but not on Metcalf's complaint.

That thereafter the Clerk of the Court inadvertently failed to interline the amendment on Metcalf's complaint with the result that it was printed in its original form in the transcript of record (Tr. 17).

Counsel for appellant made no objection to Instruction No. 9 (Tr. 109-110), could not possibly have been misled during the trial of the case to his client's prejudice because a copy of the written motion to amend had been served on him before trial and he

had stated that he had no objection, even suggesting that the amendment be made by interlineation. Appellant could have proceeded throughout the trial only on the assumption that the amendment to Metcalf's complaint had been made as directed by the Court. Nor was the point raised on motion for directed verdict (Tr. 55), objections to judgment (Tr. 121) or motion for new trial (Tr. 123).

Specifications of error Nos. 20 and 21 (Tr. 703) do not sufficiently make an issue of this point on appeal (Rule 74(d), FRCP).

XI.

FAIR COMMENT AND PRIVILEGED CRITICISM.

Appellant states on page 69 of its brief that "The Court refused to instruct that fair comment is not libel."

On page 673 of the transcript, and with respect to the Defendant's Proposed Instruction No. 23, the Court said:

"No. 23, and again on the matter of fair comment, is substantially covered by the instructions, except for the last paragraph which is refused."

The last paragraph of Proposed Instruction No. 23 which was refused reads as follows (Tr. 86):

"The statement in the article complained of that the plaintiffs' action in connection with the special ferry fund paralleled the Olson case in the receipt and disbursement of public funds *is a*

statement of fact. If you find this fact to be true, and the other statements purporting to be facts to be true also, and the opinion or comment contained in the editorial to be fair comment and privileged criticism, your verdict must be for the defendant."

The italicized portion clearly indicates the reason for the Court's refusal.

Instruction No. 8 given by the Court was a thorough and completely fair coverage of fair comment and privilege (Tr. 106).

The case law cited by appellant on fair comment and privilege on pages 69-71 of its brief is good law and was fairly applied by the Court in this case in its Instruction No. 8 (Tr. 106).

Appellant should be well aware of the limits of the rule as outlined in the case of *Rustgard v. Troy*, 6 Alaska 338 (1921), an action against the father of the present owner of the Daily Alaska Empire wherein the Court quoted Newell on Slander and Libel with approval in part as follows:

"For the same reason the publication of falsehood and calumny against public officers and candidates is an offense most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens to their great injury."

This point does not appear to have been raised in appellant's specifications of error anyway.

CONCLUSION.

A completely fair and impartial trial was accorded defendant.

The defense that the publications were true and the facts and the law concerning the claimed "parallel" with Oscar Olson were fully presented to the jury.

The defense of fair comment was fully explained to the jury and unusually wide latitude was accorded defendant in the introduction of evidence.

The defense of privilege was even submitted to the jury although it would appear under the holding of this Court in *Swift & Co. v. Gray* (CCA 9th, 1939), 101 F 2d 976, that this would be solely a question of law for the judge to determine.

Of the three types of embezzlement mentioned in Section 65-5-63 ACLA, namely:

1. Conversion to own use
2. Loan
3. Neglect or refusal to pay over

defendant was given wide latitude to introduce evidence as to the latter two and the jury was thoroughly instructed. As to the crime of converting to own use, defendant never in its pleadings raised this issue and conceded repeatedly during the trial that it did not contend the plaintiffs had converted to their own use. Possible shortages in the Ferry fund were not mentioned in the publications and not raised as an issue in defendant's pleadings. The "substantial loss of public funds" mentioned in the second affirmative

defense was pleaded in connection with the purchase price paid by the Territory for the ferry and its net operating loss to substantiate the defense of public interest, duty (to publish facts), privilege and fair comment. In any event, defendant's own Exhibit C proves that there was no shortage in the fund.

Defendant was not prejudiced by not being permitted to introduce certain cancelled checks exchanged between Purser Coughlin and his agent Steve Homer. At best, these checks could only have confused the jury over entirely irrelevant transactions between "an agent of an agent" and could have shed no light whatsoever on whether or not plaintiffs had committed the crime of embezzlement in one of its forms.

These cases appear to the writer to be a sharply chiseled illustration of the very type of human abuse that the law of libel was intended to prevent.

Freedom of speech is a jealously guarded privilege in our law but when exercise of the privilege exceeds the bounds of social and moral decency the law justly provides for appropriate punishment.

Here, under the pretext of criticizing a method of handling receipts and disbursements, the acts of three of the highest Territorial officials, all of whom had long and honorable records of public service, were compared to those of an admitted thief in a front page spread that could hardly have been made more sensational in appearance if the United States had unexpectedly declared war.

It is respectfully urged that the judgments should be affirmed.

Dated, Anchorage, Alaska,
August 31, 1956.

Respectfully submitted,
BUELL A. NESBETT,
Attorney for Appellees.

No. 15,052

United States Court of Appeals
For the Ninth Circuit

EMPIRE PRINTING COMPANY,
a corporation,

vs.

HENRY RODEN, et al.,

Appellant,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

APPELLANT'S REPLY BRIEF.

H. L. FAULKNER,

Juneau, Alaska,

Attorney for Appellant.

FILED

SEP 19 1956

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No. 15,052

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Appellant,

VS.

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Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

APPELLANT'S REPLY BRIEF.

In the first several pages of the brief of appellees there is a statement of the case which states certain facts and then deals with the question of malice, which we think is immaterial to the argument before this Court. This statement in certain respects states as facts matters which were denied by the defendant and which at most presented a question for the jury. We think this is unimportant because if the appellant's specifications of error are well taken, the question of malice becomes immaterial.

APPELLEES' VIOLATION OF THE LAW.

The appellees state at page 18 of their brief:

“The great weight of the testimony, however, being that there was no violation of the law.”

Appellant contended throughout the trial that whether there had been a violation of the law was for the Court to determine from the evidence and from the facts admitted, and not something to be submitted to the jury because appellee Roden's opinion was in the negative. The law is plain, and no opinion or hearsay testimony, such as we find at pages 413 and 416 of the transcript, could change it.

We repeat, as in our opening brief, the Attorney General was not called as a witness nor was any opinion of his offered at the trial. Neither the belief of Mr. Roden nor the opinion of the Attorney General, if there had been any such opinion, would make the slightest difference or relieve the appellees from liability for any violation of the law committed by them.

On page 30 of their brief appellees refer to the opinion of this Court in *Dimmick v. U. S.*, 121 F. 638, cited at page 37 of appellant's opening brief, and say the Court upheld the judgment of the trial court in that case "on the basis that the offense was a wilful and felonious failure to comply with the specified requirements of the Secretary of the Treasury". However, twenty years later, in the *Balint* and *Behrman* cases cited on pages 38 and 39 of our opening brief, the Supreme Court of the United States pointed out that under such statutes as those under consideration, ignorance and good faith are no defense. Such statutes create what are known as public welfare offenses, and under such statutes no felonious intent is involved and it is immaterial whether the act

denounced by the statute is committed wilfully or innocently. There are a great number of such statutes. Some of them deal with violation of the anti-narcotics law, some with the pure food law, some with automobile traffic, some with the Internal Revenue laws, and many deal with the handling of public funds. These statutes are enacted for the protection of the public and the interest and rights of the public far outweigh any considerations to the individual defendant involved. Appellant has cited some of the leading cases under these laws in its opening brief. A good illustration of the operation of these public welfare statutes and one for the protection of the public is found in the traffic laws. Good intentions are no excuse for noncompliance.

But, aside from all this, we submit that in this case the appellees surely must have set up the Ferry Fund wilfully when they, as the Board of Road Commissioners, passed the motion (R. 351-2) which appellant contends was designed to circumvent the law.

LOAN OF PUBLIC FUNDS.

The cases appellant cites at pages 63, 64 of its opening brief seem to clearly hold that a bank deposit is a loan to the bank. Appellees cite at page 44 of their brief the case of *U. S. F. & G. Co. v. Carter*, 170 S.E. 764, but that case is not in point and is readily distinguishable, and we hardly think the Virginia Court attempted to overrule the Supreme Court of the United States in the case of *New York County Bank*

v. Massey, 192 U.S. 138, and the other cases which we have cited.

The laws of Alaska which were violated by the appellees were those requiring all public funds to be deposited in the treasury of the Territory and providing a penalty for noncompliance. The case of *U. S. F. & G. Co. v. Carter*, *supra*, dealt with the actions of the Treasurer under the laws of Virginia. The instant case is concerned with the actions of the appellees in the handling of public funds without transferring them to the Treasurer. Once the public funds are transferred to the Territorial Treasurer, the public is protected, because the laws of Alaska require a very substantial bond to be given by the Treasurer (see Section 7-1-4 ACLA 1949) and when the Treasurer deposits the public funds in a bank, he in turn requires the bank to secure the Territory, and Chapter 108 of the SLA 1953 empowers the banks which are depositories of public funds to pledge their assets and to give security to the Treasurer for the safekeeping of the funds. In this case the appellees placed the public funds in the hands of Robert E. Coughlin without any bond from him. He made the deposit subject to his own check and that of no one else. Surely under the circumstances this was a loan to the bank.

Appellees have not discussed in their brief the effect of the "advances" to Coughlin out of the Ferry Fund, or the "personal loan" to Steve Homer from the public funds, as shown by Defendant's Exhibit C, not printed.

TRUTH AS A DEFENSE.

Appellees devote some attention in their brief to the question of truth as a defense in a libel suit. Appellant has dealt with this in its opening brief and shown how the Court instructed that the truth of the statements made in the alleged libelous article would not be available as a defense to the appellant unless known at the time the article was written, and appellees now urge that this was not pleaded by the defendant. However, in paragraph 3 of the Second Affirmative Defense, found on pages 21, 41 and 49-50 of the Record, the defendant alleges as follows:

“That in the venture of the Territory into the transportation business as set forth in plaintiffs’ complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of the vessel CHILKOOT, but in its operation, and one of the duties of the defendant is to inform the public of the facts and of all the irregularities in the handling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign * * *”

Moreover, we do not think that the details of the loss of funds and the irregularities in the purser’s accounts would need to be pleaded at all. Defendant discovered these details long after the pleadings were filed, and some of them on the eve of the trial. The Court rejected the evidence of the loss of the funds as it was offered by defendant, as set forth in detail in appellant’s opening brief. Even if it had been

necessary to amend the answers to conform with the proof, under the Court's ruling defendant was denied that right, for the Court rejected all proof of the loss of public funds. However, we think all this argument in appellees' brief is beside the point, because not only was there positive allegation of loss of funds and of irregularities, but we think the pleadings were more than amply sufficient to raise the question. Furthermore, the offense committed by the appellees in diverting public funds from the course and disposition required by law was in itself sufficient to constitute a crime denounced by the statute and for which the same punishment was provided as that inflicted upon Oscar Olson, the former Treasurer of the Territory. The statute is designed to protect the public and to see that Territorial officials, with or without felonious intent, are prohibited from playing fast and loose with Territorial monies.

LOST CHECKS.

We have covered this matter quite fully in our opening brief, and we repeat that it was in the power of the appellees to have produced or at least preserved for production all the checks issued on the Ferry Fund. They were all in office for a period of six months after they brought these suits and they should know what became of those checks. Appellant made every effort to have them produce the checks after discovering the Ehrendreich reports, and under the issues in the case, we think this is an instance where it was within the power of the appellees to

have supported their denial of irregularities by better evidence than they did produce, provided, of course, the checks would have been of assistance to them in meeting the allegations of loss of public funds set forth in the pleadings, and if the checks showed the ferry account to have been handled honestly.

RUSTGARD v. TROY.

The appellees in their brief on page 51 refer to the case of *Rustgard v. Troy*, decided by the District Court for Alaska and found in 6 Alaska 338. They copy one sentence from the District Court's quotation from Newell on Slander and Libel. This sentence standing alone is incomplete. The entire paragraph cited by the Court there reads as follows:

“While it cannot be said that the law upon this subject is very well settled in the United States, it seems clear that, when a man consents to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue so far as it may relate to his fitness and qualifications for the office, and publications of the truth on this subject, with the honest intention of informing the people, are not libels. It would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against the law. For the same reason the publication of *falsehood and calumny* against public officers or candidates for public offices is an offense most dangerous to the people and deserves punishment, because the people may

be deceived and reject the best citizens, to their great injury.” (Italics ours.)

Newell on Slander and Libel, Third Edition,
page 93.

We might add that on page 344 the Court disposes of the *Rustgard* case in language as follows:

“I do not see that any damage whatever, general or special, has been caused the plaintiff as the natural or proximate consequence of this publication.

The demurrer will have to be sustained.”

CONCLUSION.

Appellees have not met appellant's contentions raised in its brief or attempted to discuss the authorities we have cited, but they seem to have made a labored effort to make an argument based on refinements, nice distinctions and strained constructions to show that there is a difference between converting public funds to the personal use of appellees on the one hand and lending them and refusing to remit them to the Territorial Treasurer as the law requires, on the other hand, and under statutes where punishment for any one or all of these acts is provided in the same statute, and called embezzlement.

Dated, Juneau, Alaska,

September 12, 1956.

Respectfully submitted,

H. L. FAULKNER,

Attorney for Appellant.

No. 15,053

In The
**United States Court of Appeals
For the Ninth Circuit**

ALBERT LLOYD ANDERSEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

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In The
**United States Court of Appeals
For the Ninth Circuit**

No. 15,053

ALBERT LLOYD ANDERSEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

STATEMENT OF THE CASE

A jury returned a verdict finding appellant guilty on both counts of the following indictment:

"THE GRAND JURY CHARGES:

COUNT I

That on or about the 1st day of August, 1955, ALBERT LLOYD ANDERSEN, defendant named above, at Las Vegas, State and District of Nevada, did unlawfully and knowingly photograph, and print the likeness of, a genuine Fifty Dollar (\$50.00) United States Federal Reserve Note, Serial Number BO 30 12622A, Federal Reserve Bank of New York, face plate No. 17, Check Letter D, Series of 1950, in violation of Title 18, Section 474, United States Code.

COUNT II

That on or about the 1st day of August, 1955, ALBERT LLOYD ANDERSEN, defendant named above, at Las Vegas, State and District of Nevada, did unlawfully and knowingly photograph, and print

the likeness of, a genuine Twenty Dollar (\$20.00) United States Federal Reserve Note, Serial Number B12959821 B, Federal Reserve Bank of New York, Series of 1950A, in violation of Title 18, Section 474, United States Code.”

For a more orderly presentation, the factual summary and testimony, as it relates to the various assignments of error, will be incorporated in the argument.

ARGUMENT

I

THE DENIAL OF APPELLANT’S MOTION TO SUPPRESS THE EVIDENCE AND THE SUBSEQUENT ADMISSION OF THE PHOTOGRAPHIC PRINTS AND NEGATIVES OF UNITED STATES TREASURY NOTES IN EVIDENCE WAS PROPER, AND DID NOT VIOLATE APPELLANT’S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS.

Appellant assigns as error failure of the trial court, upon motion, to suppress certain evidence discovered and seized by local police officers during the search of appellant’s office suite. The warrant of arrest and the warrant of search were issued out of the local State justice court, and were both unrelated to the federal charge upon which appellant was convicted.

Appellant first contends that the evidence was not admissible for the reason that federal officers cooperated in the seizure and removal of the evidence.

“ * * * . Generally speaking, in federal courts State officers are considered as strangers as far as the use of evidence procured by search and seizure is concerned; and although search and seizure by State

officers may be illegal, if made entirely independent of any cooperation with federal officers, the evidence seized is usually admissible in the federal courts. 20 Am. Jur., Evidence, Sec. 397."

—*United States v. Haywood*

208 F. 2d 156 (7CA. 1953), at page 158.

Before discussing the authorities on this issue a review of the pertinent testimony is necessary. First, by way of summary: On September 22, 1955, at approximately 4:00 P.M. Jack D. Ruggles and Herbert L. Barrett, police officers of the Las Vegas, Nevada, Police Department, armed with both a warrant of arrest and a warrant of Search issued out of a local state court, entered upon appellant's office premises, consisting of five small rooms, at 114 North Third Street, Las Vegas, Nevada. Appellant was shown the warrant of arrest and was placed under arrest. He was then shown the search warrant, and thereafter the officers commenced the search of appellant's premises. During the course of the search, Officer Barrett came upon evidence, consisting of a plastic bag containing photographic prints of U. S. Treasury Notes, which did not relate to the purpose of the search. Officer Ruggles then requested appellant to unlock the dark room. Appellant complied. In this room were found miscellaneous photographic equipment (T. Vol. 1, Pg. 88, line 221), including chemicals ("chemicals" are enumerated in the search warrant, appellant's Exhibit "A"), and an overnight bag containing certain photographic prints and negatives of \$20.00 and \$50.00 U. S. Treasury notes, also the subject of the motion to suppress. Sometime thereafter the two officers gathered up the evidence.

At approximately 6:00 P.M., Officer Ruggles, realizing there was no United States Treasury Agent stationed in Las Vegas, called to the local office of the Federal Bureau of Investigation, and asked that an agent come over. Shortly thereafter Special Agents Bryon C. Wheeler and W. Albert Stewart came upon the premises. Neither of the agents

participated in the search or the seizure, nor did they give any instructions to the police officers except to state that the matter was out of their jurisdiction and that they would furnish the telephone number of the Treasury Agent in Los Angeles. The federal agents were in the appellant's office not more than five minutes. Thereafter, the evidence was removed by the police officers to the Las Vegas Police Department where it was tagged by Officer Barrett.

The testimony of Police Officer Ruggles and Special Agents Wheeler and Stewart of the Federal Bureau of Investigation, as it applies to this issue, follows:

Testimony of Jack D. Ruggles, Sergeant, Las Vegas Police Department, on examination by appellee, pg. 53, lines 5 through 9.

Q. For what purpose were you upon the premises at that time?

A. I had in my possession a warrant of arrest for Dr. Andersen. I also had in my possession a warrant to search the premises of his office. Pg. 70, line 14 through pg. 71, line 6.

COURT: What was the charge contained in the warrant under which you arrested the defendant?

A. Grand larceny.

COURT: Based upon a complaint filed where?

A. With our local Police Department.

COURT: Nothing in the Federal Court at all?

A. No, sir.

COURT: And did any Federal Officers know you were going to make this arrest?

A. No, sir.

COURT: Had you conferred with any Federal Officers about this defendant before you made any arrest?

A. No, sir.

COURT: Had any member, had your associate, or the officer who accompanied you, Mr. Barrett, had he conferred with, do you know if he conferred with any Federal Officers?

A. Mr. Barrett didn't know I was going to make the arrest until ten minutes prior to the arrest.

On Cross Examination by appellant, Pg. 79, line 10 through Pg. 80, line 24.

Q. Is it not a fact, Mr. Ruggles, that when Mr. Barrett brought these bills to you that you then picked up the telephone in the office and phoned a federal agent?

A. After we had gathered up the evidence and were ready to go the thought occurred that there was no Secret Service man in this town, so I phoned the FBI and asked them to step over to the office due to the fact it was right next door. * * *

COURT: Next door to what?

A. Next door to their office. It was the next building over.

COURT: To what office?

A. The FBI office is right around the corner. Dr. Andersen's office is in the building north of the FBI office. I asked them to step over, that I wanted to inquire of them how to contact the nearest Secret Service agent, or whether or not, if they could— — —

COURT: Tell me what they did?

A. They came to the office.

COURT: To Dr. Andersen's office?

A. Yes, they did.

* * * * *

COURT: As a result of this you took these with you?

A. Well, I already had it ready to go.

COURT: It don't look too good.

MR. MORGALI: That's right, your Honor. That is what I am trying to bring out.

A. These FBI agents told me they had no authority in the case and referred me to Agent Spaman, in Los Angeles.

Q. Is it not a fact you phoned the FBI when Sergeant Barrett first brought you one or two of the bills?

A. No, it is not a fact.

Q. And, is it not a fact you phoned the FBI for instructions as to what to do.

A. The FBI gave me no instructions and they told me they had no authority whatsoever, and they gave me no assistance whatsoever, and turned around and walked out.

* * * * *

Pg. 85, line 12 through Pg. 86, line 15:

COURT: * * * * * I think it would be just as well for you now, before we go any further, to just state what you did in connection with the members of the Federal Bureau of Investigation. Explain how they happened to be there and what was said and done. Will you please?

A. I remember Agent Wheeler as one of the agents. The other gentleman I don't remember what his name is. It was after their working hours and I didn't expect them to be in when I called, but Agent Wheeler was there and I told him that I was in a building north of him and I asked him if he could step over before he went home and he said he would be right over. At the time we had, I believe, all of the evidence that we could carry stacked ready to go and they walked in and I pointed out what I had and he said 'it looks like someone has been photographing money.' I inquired if they

had any jurisdiction, due to the fact that there was no treasury agent in this locality, and could they assist me with the federal offense that apparently had been committed, and they promptly told me that they had no jurisdiction in the matter. They referred me to Agent Spaman in Los Angeles. In fact, I believe they gave me his phone number, which I didn't have prior to that time. They did see some of the evidence. They identified themselves to Dr. Andersen. They didn't question Dr. Andersen any. They may have asked him who he was, but they soon left. They didn't make any search, nor did they seize any evidence, nor did they order me to seize any.

Pg. 87, Line 22 through Pg. 89, line 7:

A. * * * * In the meantime I told Barrett to search the entire office premises for the articles listed on the search warrant and he began searching. It was not long until Detective Barrett asked me to come into the other room. I left Dr. Andersen and went into the other room and he pointed out a plastic bag full of these notes and these printed up bills.

COURT: Such as in these exhibits?

A. Yes, sir. I took it in and confronted Dr. Andersen with it and asked him where he had obtained it and he said he had been photographing money and transferring the photograph onto the money, which was his hobby, and I told him I didn't think it was legal as a hobby or any other respect to photograph money, so I ordered Detective Barrett to further search the premises for any kind of equipment that he might use to make these photographs with, in addition to the things listed on the original warrant, and Detective Barrett stated there was a room back there that had three or four

different locks on it and he couldn't get in. I requested Dr. Andersen to unlock it and he took out a set of keys and started to unlock it. He unlocked each of the locks and when the locks were off it was a dark room approximately four feet by four feet. It had a phone, a developing tray, all sorts of chemicals and things photographers would use. There was a large portrait camera. That was not in the dark room. It was on a table outside the dark room. Most of the stuff was in the room on the west side of the office. So we gathered up—we also found in the dark room, as I remember, a small overnight bag or suitcase and we took it out and opened it and it had a leather case with several different compartments and in these compartments we found these negatives and bills that looked much better than the ones in the plastic bag . * * * * .

Testimony of Bryon C. Wheeler, Special Agent, Federal Bureau of Investigation, on examination by appellant on motion to suppress, Pg. 128, line 1 through Pg. 130, line 9:

Q. On September 22, 1955, did you have occasion to go in the building at 114 North 3rd Street, Las Vegas, Nevada?

A. I did.

Q. Under what circumstances?

A. Detective Ruggles of the Las Vegas Police Department called my office shortly before 6:00 o'clock on that date and stated that he had something at the office of Dr. Andersen that would possibly be of interest to us, and asked us to come over. I, together with Special Agent, W. Albert Stewart, proceeded to the office of Dr. Andersen. Upon entering the office we were introduced to Dr. Andersen by Mr. Ruggles, and Mr. Ruggles then showed us some photographed currency, what appeared to be photographed currency on the desk.

- Q. On which desk? Which room? Do you remember?
- A. It was in the inner room as you are going through the door. I suppose it was the doctor's private office. It appeared to be. And he showed us this money — this photographed money. I then talked to Detective Ruggles — took him out to the outer office and told him that the FBI had no jurisdiction in this matter and that he should refer it to the Secret Service.
- Q. Did you examine any of these prints at that time, as are shown on Prosecution Exhibit 1 for identification?
- A. Not that I recall.
- Q. Did you have any conversation with Dr. Andersen concerning the clarity of the print, or anything like that?
- A. No.
- Q. How many — strike that. You stated you told Mr. Ruggles to refer the matter to the Treasury Agent?
- A. Yes. As a matter of fact I told Detective Ruggles that upon my arrival at my office I would attempt to obtain the telephone number of the Secret Service in Los Angeles, and subsequent to my departing from the office — from Dr. Andersen's office — I obtained that number and called Detective Ruggles back. We were in the office of Dr. Andersen for approximately four or five minutes.
- Q. Did you tell him to do anything with the prints?
- A. I gave him no instructions regarding those bills.
- Q. Did you tell him to take the notes along with him to the police station?
- A. No. I didn't. No, I did not.
- Q. Mr. Wheeler, did you see a plastic bag containing bills, or parcels of bills at any time?
- A. I don't recall. I don't recall. I can't recall at the time whether I did or not.

Q. How many bills were spread upon the desk?

A. That would be difficult to estimate. I don't know. There were several. There was quite a small pile of them.

Q. That is all. Oh, just one moment. When you left the office did you have any understanding that the matter would be referred to the Treasury Agents?

A. No, we did not. I simply told Detective Ruggles that it should be referred to them; that they would probably be interested in the matter.

Testimony of W. Albert Stewart, Special Agent, Federal Bureau of Investigation, on examination by appellant on motion to suppress; Pg. 131, line 17, through Pg. 133, line 8:

Q. On the evening of September 2, 1955, did you have occasion to go to the building at 114 North 3rd Street?

A. Did you say September 2nd?

Q. September 22nd.

A. Yes, sir.

Q. About what time of the day?

A. It was approximately six o'clock, P.M.

Q. Under what circumstances?

A. I was in my office at 300 Fremont Street with Agent Wheeler. We received a telephone call from Detective Ruggles, who stated that he was in an office in an adjoining building and thought he might have something we would be interested in and asked if we would come right over. We stated we would, and did go right over to an office in an adjoining building. When we arrived I observed a pile of what appeared to me to be photographs of money lying on a table. Agent Wheeler and myself both advised Detective Ruggles that this was something over which we had no jurisdiction; that it was a matter for the Secret Service. Then we retired from the office.

Q. How long were you in the office, approximately?

A. Not more than five minutes.

Q. I show you Prosecution Exhibit 1 for identification and ask you while you were in the office if you examined any prints, such as are shown on Prosecution Exhibit 1 for identification? (Exhibit handed to witness.)

A. This appears similar to something I saw on the desk. I did not make any minute examination of it.

Q. Who received the telephone call from Detective Ruggles?

A. Agent Wheeler.

Q. What conversation did you have with Detective Ruggles before you left the office?

A. I merely stated to Detective Ruggles that this was something not within our jurisdiction.

Q. Was there any conversation had concerning the Treasury Agent? The United States Treasury Agent?

A. I believe Agent Wheeler, in my presence, stated to Detective Ruggles that he would obtain the telephone number and name of the Secret Service agent in Los Angeles, and would call it back to him.

The testimony of the state and federal officers, indicates clearly that the state officers were acting independently of the federal government in the search, and that there was no participation by the federal agents in either the search or the seizure.

In the Ninth Circuit case of *Brown v. United States*, 12 F. 2d 926 (CA9, 1926), a federal prohibition officer informed a member of the local police force that an automobile load of intoxicating liquor was to be delivered that evening at a certain house. The police officer answered that he knew of the place and that he had a search warrant

for it. Thereafter two police officers in one car and three prohibition officers in another went to the place, and in the vicinity thereof stationed themselves and waited until an automobile was driven into the garage and lights were turned on in the house. Some twenty minutes later the police officers entered the house and discovered a large quantity of liquors. *Being informed of this discovery, the prohibition officers entered and assisted the police officers in removing the liquors.* (Italics supplied).

It was contended that the search and seizure were illegal, by reason of participation by the federal officers.

The Ninth Circuit, in answering this contention, held:

“The court below, to whom the case was submitted for decision, a jury having been waived, expressly found that there was no such agreement or understanding, but that, on the contrary, the evidence was that the police officers on their own initiative had procured a search warrant under the state law to search the house before the federal officers conferred with them. The federal officers, so far as the evidence goes, had in mind the seizure of a load of liquor to be delivered at that house. They took no part in the search, and the search was not made under their authority. We think the evidence so obtained was clearly admissible. (Citing cases).”

It should be noted that while the State of Nevada has no specific statute prohibiting the making of photographs and prints of United States obligations in the likeness thereof, there is a state criminal statute prohibiting counterfeiting in the following language:

“Every person who shall counterfeit any of the species of gold or silver or paper money now current or that shall hereafter be current in this state, . . . , shall be deemed guilty of counterfeiting,”

—Nevada Compiled Laws, 1929, Vol. 5, Sec. 10364.

The Tenth Circuit, in the case of *United States v. Butler*, et al., 156 F. 2d 897 (10 Cir., 1946), has well summarized and reviewed the federal decisions wherein state officers were involved in the search and seizure of evidence later used for federal prosecution.

“ * * * . It has been held without deviation over a long period of time that evidence obtained through wrongful search and seizure by state officers, acting independently of the federal government, and not in the presence of nor with the participation of federal officers, is admissible in a prosecution in a United States Court, even though the property seized was by the State officers delivered to federal authorities for the purpose of being used as evidence in connection with the prosecution. *Burdeau v. McDowell*, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159; *Feldman v. United States*, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408; *Sloane v. United States*, 10 Cir., 47 F. 2d 889; *Aldridge v. United States*, 10 Cir., 67 F. 2d 956; *Edgmon v. United States*, 10 Cir., 87 F. 2d 13; *Taylor v. Hudspeth*, 10 Cir., 113 F. 2d 825; *Ruhl v. United States*, 10 Cir., 148 F. 2d 173; *Butler v. United States*, 10 Cir., 153 F. 2d 993.

“But evidence obtained through such a search and seizure by state officers in cooperation with federal officers, or in the presence of federal officers, should be suppressed when seasonably challenged in an appropriate manner. *Byars v. United States*, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520. Similarly, where state and federal officers have a general understanding and common practice that the latter may adopt and prosecute in the federal courts offenses which the former discover in the course of their operations, and a prosecution which originated by an unlawful search and seizure by state officers is adopted, the evidence obtained as the result of the search and seizure is to be suppressed in like manner as though the search and seizure had been made by federal officers. *Fowler v. United States*, 7 Cir., 62 F. 2d 656; *Sutherland v. United States*, 4 Cir., 92 F. 2d 305; *Lowrey v. United States*, 8 Cir., 128 F. 2d 477. And where state officers obtain evidence through means of an unlawful search and seizure, not made under any pretense of enforcing state law but solely in behalf of the United States for the intended purpose of criminal prosecution, it is open to suppression by appropriate proceeding timely taken. *Gambino v.*

United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293, 52 A.L.R. 1381; *Aldridge v. United States*, supra; *Edgmon v. United States*, supra.”

Appellant relies upon the decisions of *Byars v. United States*, 273 U. S. 28, and *Lustig v. United States*, 338 U. S. 74, to support his contention that the federal officers became a cooperative agency in the search and seizure in question. Factually, however, these two cases are readily distinguished from the case at bar. In the *Byars* case, a state search warrant was obtained to direct a search for intoxicating liquors and instruments and materials used in the manufacture of such liquors. A federal agent was asked to accompany the state officer, which he did, and participated with the state officer in the search and seizure of the contraband. In the *Lustig* case, the federal treasury agent had knowledge of the proposed search by local police officers to determine the activities of the defendant. The federal agent was not present during the initial search by the police officers but was present when the defendant and his companion returned to their room at which time the two were arrested and searched by the city police and the articles evidencing counterfeiting of currency were turned over to the federal agent at that time, following his examination and selection of the evidence.

In the instant case the evidence in question was found during a valid search by local police officers. At the conclusion of the search the two federal agents were called to the place of search. Those officers did not participate in any search; they did not seize the evidence nor did they direct the local officers in any function other than to give the telephone number of an interested federal agency. To spell federal participation under these facts would require redefinition of the words “participate” and “cooperate”. As stated in the *Lustig* case, supra, “It is immaterial whether a federal agent originated the idea or joined

in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it."

In the case under consideration the federal agents did not join in the search nor were they in it before the search was completely accomplished. The local police officers had completed the search and had taken possession and seized the evidence before the call was made to the federal officers. The object of the search was completely accomplished.

Appellant asserts, on page 15 of his opening brief, that where state and federal officers have a general understanding and common practice, the latter may adopt and prosecute in the federal courts, offenses which the former discover in the course of their operations, citing inter alia, *Lowrey v. United States*, 128 F. 2d 477 (CA 8, 1947) and *Fowler v. United States*, 62 F. 2d 656 (CA7, 1932) in support of this proposition.

In the *Lowrey* case, supra, the search and seizure was made by state officers, under color of a state search warrant, the invalidity of which was conceded by the government; the state officers discovered distilled spirits without the stamp required by law. The defendant could have been prosecuted in either state or federal court. The evidence disclosed that there was a general understanding between the state and federal officers that in cases of this nature prosecution would be tendered to federal authorities "in which the federal officers, with full understanding, gave their willing cooperation."

In suppressing the evidence seized, the Court said:

"It is true that evidence obtained by state officers, acting entirely upon their own account and without participation or cooperation of federal officers, is admissible in prosecutions by the federal government.

(Case cited). But it is also held that where the state and federal officers have the understanding and operate under the practice revealed by the evidence in this case, under which the prosecution of the offender is invariably tendered to the federal officers and by them accepted if the offense is considered of sufficient importance, the evidence obtained in the course of the unlawful search by state officers must be excluded. *Sutherland v. United States* 4 Cir., 92, F. 2d 305; *Byars v. United States*, supra; *Gambino v. United States*, 275 U. S. 310; *Fowler v. United States*, 7 Cir., 62 F. 2d 656; *Ward v. United States*, 5 Cir., 96 F. 2d 189.”

And in the *Fowler* case, supra, the Court said at page 657:

“This long-time definite understanding and practice between the police and the federal prohibition department tends strongly to indicate a delegation to the police of federal authority for making the very seizures which the federal officers stood ready to take over and prosecute as their own if only the raid yielded a sufficient quantity of liquor to make it seem worthy of federal prosecution. At any rate, the federal taking over of the prosecution in accordance with such long existing understanding and practice can be deemed a ratification by the federal authority of the means whereby the contemplated search and seizures were undertaken and made. * * * ”

The record in the case under consideration is void of any evidence or proof that there was any understanding or practice existing between the police department and any federal agency in the prosecution of this type of case or any case involving federal jurisdiction.

Appellant further asserts (page 18 of his opening brief) that the seizure of the evidence was made for the sole purpose of aiding in the prosecution of a federal offense, and therefore must be excluded. The record seems clear that the local officers, during the course of a valid search upon the premises of appellant, came upon the evidence which indicated to them a violation of a federal law. Pursuing their search into the locked dark room would not make them agents of any federal

agency, for they had the clear right and duty to continue their search, under the state warrant, to its conclusion regardless of what might or might not be found.

In the case of *United States v. Valisio*, 41 F. 2d 294 (D. C. N. Y., 1930) cited by appellant (Pg. 19, Opening Brief), the state officer made a search of the truck without a warrant and before the arrest of the defendant. Upon discovery of the contraband, the officer made the arrest for violation of the applicable federal statute. Motion to suppress the evidence was granted. This case is readily distinguishable from the case at bar, in that appellant was first placed under arrest before the search, under a state warrant, was commenced. The police officers were upon the premises acting on behalf of the State, and not as agents interested in the violation of a federal offense.

And in the case of *Gambino v. United States*, 275 U. S. 310 (1927), the testimony reflected and the court so held that the state troopers, in the search and seizure, acted without probable cause, and solely on behalf of the United States; accordingly, the evidence seized was excluded.

The appellant suggests that the search was general and exploratory. On the contrary, the search warrant (Appellant's Exhibit "A") specifically enumerates certain stolen personal property believed to be upon the premises in question. Certainly, this was no lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found.

In the case of *United States v. Lefkowitz*, 285 U. S. 452 (1932), the Court said at page 465:

“The decisions of this Court distinguish searches of one’s house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, * * * .”

It should be of no significance that the photo-prints and negatives seized were unrelated to the crime for which the warrant of search was directed.

In *Harris v. United States*, 331 U. S. 145 (1947), federal agents arrested the accused and without a search warrant searched his apartment for five hours for two cancelled checks and other means by which the crimes charged might have been committed. In an envelope they discovered a sealed envelope marked “personal papers” of the accused. This was opened and found to contain several draft cards which were the property of the United States, the possession of which was a federal offense. The accused was later convicted of violations of the Selective Training and Service Act upon the evidence obtained, and which was unrelated to the crime for which he was originally arrested. The Court held it not to be “a significant consideration that the draft cards which were seized were not related to the crimes for which the petitioner was arrested.” The Court went on to say that in “keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States.” While the evidence seized in the instant case might not be considered a continuing offense against appellant, a cursory examination by the police officers immediately revealed to them that a crime had been committed, and that the property was evidence of that crime. Certainly there can be no distinction which would allow seizure in one case and not in the other. It must also be remembered that the search of appellant’s office was made pursuant to a warrant of search, and that when the evidence in this case was discovered

the search did not terminate. Further, in the *Harris* case, *supra*, the search was conducted by federal officers as contrasted with the instant case where the search was by state officers.

II

THE COURT PROPERLY EXERCISED ITS DISCRETION IN RULING ON THE MANNER IN WHICH EXPERT TESTIMONY, RELATING TO THE MENTAL CONDITION OF THE APPELLANT, BE PRESENTED.

Appellant assigns error of the court "in refusing to permit experts to testify as to appellant's mental condition unless they heard the evidence bearing on that subject which was given in open court."

"The general rule that matters pertaining to the examination of witnesses rests largely within the discretion of the trial court, applies in the case of skilled or expert witnesses who testify as to matters of opinion. * * * "

—32 C. J. S., Evidence, Sec. 549, Pg. 343.

When the defense of insanity arose in the progress of the trial, appellant's counsel informed the court that appellant would be on the witness stand testifying as to his mental condition the entire afternoon, or approximately two and one-half hours, and that Dr. James H. Swartzfager would thereafter be called as an expert witness, to testify as to the mental condition of appellant, by means of a hypothetical question, (T. Vol. 2, Pg. 349).

The following colloquy took place, (T. Vol. 3, Pg. 354):

"COURT: In other words, you propose to keep this man (appellant) on the stand all afternoon, and then you are going to embody another afternoon so some doctor can sit here on the witness stand and listen to it. Is that what you are going to do?

Mr. Morgali: Yes.

COURT: It is going to take quite a while to propound that hypothetical question?

Mr. Morgali: Maybe ten or fifteen minutes, maybe more."

The court later recessed at 2:30 P.M., to allow appellant to have his medical experts in court the following morning to hear the testimony of the appellant upon this issue, (T. Vol. 3, Pg. 363).

It is evident that the court was of the view, and properly so, that the proposed hypothetical question, based upon an afternoon session discourse by the appellant, would be a tedious and useless question, and by the very nature of its length, would tend to confuse rather than be of any aid to the jury in determining the mental condition of the appellant. The testimony of appellant on this issue covered fifty-eight pages of transcribed testimony, (T. Pages 365 through 423).

Wigmore on Evidence, Third Edition, Vol. II, Sec. 685, has this to say on the length of a hypothetical question:

"On principle, the questioner is entitled (as already noted) to obtain an opinion upon any combination of facts, however few or however numerous. Hence, the mere length of a question of itself is no objection. But, for the same reasons of policy as before, the Court may exclude a question which by its length tends to confuse or mislead the jury without being of appreciable service. This discretion of the trial judge ought to be absolute, and should have been exercised much more frequently than it is in excluding tedious and useless questions."

In *Davis v. Traveler's Ins. Co.*, 52 Pac. 67, (Kan. 1898) the court said:

“ * * * * We know that, in order to the formation of a satisfactory opinion by a medical expert, all pertinent facts from which a generalization can be drawn should be stated, and also that the length of a hypothetical question is very largely in the discretion of the court trying the case (citing cases); but we think it may be extended to such a great length, and be burdened with such prolixity of detail, as to be confusing, rather than enlightening, to the jurors at least, and thus obscure in their minds the essential facts upon which the diagnosis is based. * * * * ”

Jones on Evidence, Fourth Edition, Sec. 374, pg. 702, discusses the procedure adopted by the Court in the instant case:

“ * * * But it is not necessary in all cases to recapitulate in hypothetical form the facts which are alleged to have been established, and which are assumed as the basis for the experts opinion. Thus, if the expert has heard a deposition read, or has heard the testimony of a witness or even of several witnesses in which no conflict appears, and the testimony is not voluminous, he may give an opinion based on the assumption that such evidence is true; and where there is no conflict as to the material facts, the question need not be hypothetical in form. The witness is allowed to give an opinion from the evidence in such a case upon the ground that, by the terms of the question, he is required to assume that the facts given in testimony are true; and he is not required to draw any other conclusions or inferences as to the facts.”

III

THE COURT'S INSANITY INSTRUCTION WAS PROPER

The appellant's third and fourth assignments of error concerns the Court's instruction on insanity and its refusal to give appellant's requested instruction, suggested by the case of *Durham v. United States* (D. C. Cir., 1954) 214 F. 2d 862.

The Court instructed the jury as follows (Record Pg. 37):

“In order for insanity to be a legal defense to the commission of a crime there must be:

(a) Such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong; or

(b) He must be unconscious and unaware of the nature of the act at the time he is committing it; or

(c) Where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, or the governing power of his mind, has been otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control."

This instruction follows the language laid down by the Supreme Court in the case of *Davis v. United States* (1896), 165 U. S. 375, which has been cited with apparent approval by that Court in the cases of *Matheson v. United States* (1913), 227 U. S. 540, 543, and *Fisher v. United States* (1945), 328 U. S. 463, 466.

While the case of *Durham v. United States*, supra, modifies the test of criminal responsibility and departs from the rule announced in the case of *Davis v. United States*, supra, the appellee suggests that the very recent decision in the Fifth Circuit, *Howard v. United States*, 24 L.W. 2498, decided April 20, 1956, should be persuasive in determining this issue. In adhering to the rule established by the Supreme Court, that Court said:

"In the face of such recognition by the Supreme Court of a test of criminal responsibility, we do not feel at liberty to consider and decide whether, in our opinion, the recent modification of such test in the District of Columbia (*Durham v. United States*, D. C. Cir., 214 F. 2d 862) is sound or unsound, nor whether some other test should be adopted. This Circuit follows the law as stated by the Supreme Court and leaves any need for modification thereof to that Court, while the District of Columbia Circuit is entrusted with a considerable degree of autonomy with respect to law enforcement in the District. We, therefore, leave unchanged the test of criminal responsibility as thus established. * * * "

CONCLUSION

It is the earnest contention of appellee that the court's denial of appellant's motion to suppress the evidence was proper, and that the assignments of error raised by appellant are without merit. The judgment of conviction should be affirmed.

Respectfully submitted,
FRANKLIN RITTENHOUSE
United States Attorney

HOWARD W. BABCOCK
Assistant United States Attorney

Dated: June 8, 1956.

No. 15054

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

BENJAMIN HARRISON and JONES STEVE-
DORING COMPANY.

Appellees.

Transcript of Record

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FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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KEITH R. FERGUSON,

Special Assistant to the Attorney General;

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For Appellees:

GLADSTEIN, ANDERSEN, LEONARD &
SIBBETT,

240 Montgomery Street,

San Francisco, California;

For Appellee Benjamin Harrison;

JOHN H. BLACK,

EDWARD R. KAY,

233 Sansome Street,

San Francisco, California,

For Appellee Jones Stevedoring Co.

In the United States District Court for the Northern
District of California, Southern Division in
Admiralty

No. 27015

BENJAMIN HARRISON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LONGSHOREMAN'S LIBEL IN PERSONAM
FOR DAMAGES

Under the Suits in Admiralty Act, the Public
Vessels Act, and the General Maritime Law

The libel of Benjamin Harrison, longshoreman,
against United States of America and the SS
Private John R. Towle, owned, managed, operated,
maintained and controlled by said respondent, and
against all persons lawfully intervening in their
interests, in a cause of action for damages, alleges:

I.

That the vessel SS Private John R. Towle, is a
vessel of United States registry and now is and
during all of the times herein mentioned was owned,
managed, maintained, operated and controlled by
respondent, United States of America.

II.

That said respondent has an office and principal
place of business in the City and County of San

Francisco, State of California, and is within the jurisdiction of the above-entitled Court.

III.

That libelant brings and maintains this action pursuant to the provisions of 46 USCA §§741 to 752, commonly known as the Suits in Admiralty Act, 46 USCA §§781 790, commonly known as the Public Vessels Act, and under the general maritime law.

IV.

That on October 14, 1954, libelant was employed aboard said vessel by Jone Stevedoring Company as a longshoreman, and was a business invitee of respondent upon said vessel on said date.

V.

That on said date, at or about the hour of 9:15 a.m., and while libelant was engaged in the course and scope of his employment as a stevedore in the shelter deck, No. 2 hold, of said vessel, libelant was caused to and he did slip on oil which had been permitted to accumulate on the said deck of said vessel, severely injuring libelant's left leg. That libelant is informed and believes and therefore alleges that said injuries will result in his being permanently partially disabled, all to libelant's general damage in the sum of \$30,000.00.

VI.

That said injuries were directly and proximately caused by the carelessness and negligence of the respondent, its employees and agents, in permitting said oil to accumulate on the said deck without re-

moving the same or without providing sawdust or other materials to minimize the dangerous condition created by the presence of said oil on said deck.

VII.

That at the time of said accident libelant was gainfully employeed as a longshoreman, as aforesaid, earning approximately \$115.00 per week. As a direct and proximate result of said accident, libelant has been unable to work since the date of said accident, thereby incurring a loss of wages in the approximate sum of \$670.00 to date; and libelant is informed and believes and therefore alleges that he will suffer future wage loss as a direct and proximate result of said accident, in an amount presently unknown, and prays leave to amend this libel and insert herein the total wage loss, when ascertained, or offer proof thereof at the time of trial herein.

VIII.

That in order to treat said injuries, incurred as aforesaid, libelant has, and he is informed and believes and therefore alleges that in the future he will be obliged to incur medical and allied expenses in a sum presently unknown to libelant, who prays leave to amend this libel and insert herein the total amount of such medical and allied expenses, when ascertained, and to offer proof thereof at the time of trial herein.

IX.

That prior to the filing of this libel, libelant filed claim with and against respondent United States of America in and about the matters herein set

forth, which said claim has been administratively disallowed.

X.

That, all and singular, the allegations hereof are true and are within the admiralty and maritime jurisdiction of the above-entitled Court.

Wherefore, libelant prays, etc.

As and for a Second, Separate, and Additional Cause of Action Libelant Alleges:

I.

Incorporates by reference, as though here set forth at length, all the allegations contained in the first cause of action herein.

II.

That by reason of the matters hereinabove alleged, said vessel was rendered unsafe and unseaworthy as to libelant, and the respondent failed and neglected to furnish libelant with a safe place in which to work, all to libelant's general damage in the sum of \$30,000.00.

Wherefore, libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against respondent and that it be required to appear and answer upon oath all and singular the matters aforesaid; that this Honorable Court may be pleased to decree the payment by respondents to libelant of the sum of \$30,670.00,

plus future wage loss, plus medical expenses, when ascertained, plus costs of suit herein, and for such other and further relief as is meet and just in the premises.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

/s/ EWING SIBBETT,
Proctors for Libelant.

Duly Verified.

[Endorsed]: Filed December 1, 1954.

[Title of District Court and Cause.]

AMENDMENT TO LIBEL

Comes now libelant herein, and amends his libel on file herein by adding thereto the following sentence to paragraph I thereof:

“That at all times herein mentioned libelant was and is a resident of Alameda County, State of California, and within the jurisdiction of the above-entitled Court.”

Dated: April 18, 1955.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBERT,

/s/ EWING SIBBETT,
Proctors for Libelant.

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, respondent above named, and for answer to the libel on file herein admits, denies and alleges as follows:

I.

Answering unto Article I of said libel respondent, United States of America, admits that USNS Private R. Towle is now and during all times mentioned in the libel was owned, managed, maintained, operated and controlled by respondent, United States of America; denies each and every, all and singular, the allegations of said Article I not herein otherwise admitted or denied.

II.

Answering unto Article II of said libel, respondent, United States of America, denies each and every, all and singular, the allegations thereof.

III.

Answering unto Article III of said libel, respondent, United States of America, alleges that the matter set forth therein raises questions of law for the Court which are not required to be answered by libellant.

IV.

Answering unto Article IV of said libel, respondent, United States of America, admits that libellant was employed on board the USNS Private John R. Towle by Jones Stevedoring Company as a long-

shoreman; denies each and every, all and singular, the allegations of Article IV not herein otherwise admitted or denied.

V.

Answering unto Article V of said libel, respondent, United States of America, denies each and every, all and singular, the allegations thereof.

VI.

Answering unto Article VI of said libel, respondent, United States of America, denies each and every, all and singular, the allegations thereof.

VII.

Answering unto Article VII of said libel, respondent, United States of America, denies each and every, all and singular, the allegations thereof.

VIII.

Answering unto Article VIII of said libel, respondent, United States of America, denies each and every, all and singular, the allegations thereof.

IX.

Answering unto Article IX of said libel, respondent, United States of America, admits that, prior to the filing of the libel herein, libelant filed claim with respondent; denies each and every, all and singular, the allegations of Article IX not herein otherwise admitted or denied.

X.

Answering unto Article X of said libel, respondent, United States of America, denies each and every, all and singular, the allegations thereof.

Answering Unto Libelant's Alleged Second Cause of Libel On File Herein, Respondent, United States of America, Denies, Admits and Alleges as Follows:

XI.

Answering unto Article I of the alleged second cause of libel, respondent, United States of America, refers to all of the admissions and denials and allegations contained in Articles I through X of respondent's answers to the first cause of libel and incorporates the same herein by reference thereto as if the same were set forth herein in full.

XII.

Answering to Article II of the alleged second cause of libel, respondent, United States of America, denies each and every, all and singular, the allegations thereof.

Further Answering Unto the Libel Herein and for A First Separate and Affirmative Defense Thereto Respondent, United States of America, Alleges as Follows:

XIII.

That on or about 1 January 1954, Jones Stevedoring Company entered into a written contract, designated DA-04-197 TC-2616 with respondent, United States of America, which said contract, with changes immaterial herein, was at all times mentioned in the said libel, and now is, in full force and effect. That the terms and conditions of the said contract,

a copy of which is in the possession of Jones Stevedoring Company, and a copy of which will be produced at the trial, are hereby made a part hereof by reference as though fully set forth herein. That by the terms of the said contract, Jones Stevedoring Company agreed to perform from time to time all the duties of a stevedore on any vessel of the United States which the respondent might designate, such duties to include the loading and discharging of cargo. At Clause 12-a the said contract provides, in part, that Jones Stevedoring Company:

“Shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers, or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents or employees in the performance of work under this contract. The general liability and responsibility of the Contract—or under this clause are subject only to the following specific limitations:

(b) The Contractor shall not be responsible to the government for and does not agree to hold the Government harmless from loss or damage or bodily injury to or death of persons:

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed

jointly with the fault or negligence of the contractor in causing such damage, injury or death, and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents, or employees of the Contractor with specific directions of the Contracting Officer.”

XIV.

That on 14 October 1954, pursuant to the terms of the said Contract No. DA-04-197 TC-2616, respondent, United States of America, requested Jones Stevedoring Company to perform stevedoring services on board the USNS Private John R. Towle, and Jones Stevedoring Company undertook, pursuant to the terms and conditions of the said Contract, to perform the aforesaid stevedoring services, and did, for the purpose of rendering such services, take exclusive custody and control over the operation of discharging cargo from the said vessel.

XV.

That at the time of the alleged occurrence of the injuries described in said libel, Jones Stevedoring

Company was engaged in performing work on board the USNS Private John R. Towle, and in furnishing labor, services, material, equipment, supplies and facilities incident thereto, pursuant to and under the terms of the said contract. That at the said time and place, the officers, agents and employees of Jones Stevedoring Company were solely and exclusively in control of the said vessel, its gear and appurtenances including the holds and hatchways about which libelant was working at the time of occurrence of the injuries alleged in the libel. That if libelant was injured while performing work aboard the said vessel or otherwise or at all, he was injured while performing work aboard the said vessel in the course of his employment by Jones Stevedoring Company and in the performance of the said contract.

Further Answering Unto the Libel on File Herein and for A Second Separate and Affirmative Defense Thereto, Respondent, United States of America, Alleges as Follows:

XVI.

That at the time and place of the injury alleged in the libel herein, libelant so carelessly and negligently conducted himself that any and all injuries sustained by libelant were solely and proximately the result of the carelessness and negligence of libelant in the premises and that none of the injuries or damages alleged were caused or contributed to in any manner through any fault or negligence

of respondent, United States of America, its servants, agents, officers, or employees or by any unseaworthiness of the USNS Private John R. Towle.

Further Answering Unto the Libel on File Herein and for a second Separate and Affirmative Defense Thereto, Respondent, United States of America, Alleges As Follows:

XVII.

That if the libelant has been injured or damaged as alleged in the libel or otherwise or at all, such injuries and damages were solely and proximately the result of the carelessness and negligence of Jones Stevedoring Company, respondents impleaded, its servants, agents, officers, or employees.

Further Answering Unto the Libel On File Herein and for A Fourth Separate and Affirmative Defense Thereto, Respondent, United States of America, Alleges As Follows:

XVIII.

That if libelant was injured or damaged as alleged in the libel or otherwise or at all, such injuries or damages were the proximate result of risks of employment assumed by libelant under the existing circumstances and conditions, all of which circumstances, conditions and risks were open, obvious and apparent and were known to libelant, or should have been known to libelant.

Wherefore, respondent, United States of America,

prays that the libel herein against it be dismissed with costs.

LLOYD H. BURKE,

United States Attorney;

/s/ KEITH R. FERGUSON,

Special Assistant to the
Attorney General;

/s/ WILLIAM H. THORNTON, JR.,

Special Attorney, Department of Justice, Proctors
for Respondent, United States of America.

Affidavit of Mail attached.

[Endorsed]: Filed May 2, 1955.

In the United States District Court for the North-
ern District of California, Southern Division
In Admiralty No. 27015

BENJAMIN HARRISON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

JONES STEVEDORING COMPANY,

Respondent Impleaded.

PETITION TO BRING IN THIRD
PARTY UNDER RULE 56

To the Honorable, the Judges of the United States
District Court for the Northern District of Cali-
fornia, Southern Division, Sitting in Admiralty:

The petition of the United States of America, respondent herein, to implead Jones Stevedoring Company, as a third party respondent, under Admiralty Rule 56, in the above-entitled cause, civil and maritime, respectfully shows:

I.

That petitioner, United States of America, is a sovereign nation.

II.

Upon information and belief that at all times hereinafter mentioned Jones Stevedoring Company was, and now is, a corporation organized and existing under the laws of the State of California, and that the said corporation has a principal place of business in the City of San Francisco, State of California, and within the jurisdiction of this Honorable Court.

III.

That a libel in the above-entitled cause was filed by Benjamin Harrison against petitioner, United States of America, wherein libelant claims the sum of \$30,000 for general damages together with special damages for personal injuries; and that a copy of the said libel is hereto attached, marked Exhibit "A," and is by reference made a part hereof as though fully set forth herein.

IV.

That petitioner is filing its answer to the said libel denying all liability to libelant and the issues

raised continue pending without trial or adjudication.

V.

That on or about 1 January, 1954, respondent impleaded, Jones Stevedoring Company, entered into a written contract designated Contract DA-04-197 TC-2616 with petitioner, United States of America, which said contract with changes immaterial herein was at all times mentioned in the said libel and now is in full force and effect, the obligations and liabilities of which contract have been duly assumed by the third-party respondent herein. That the said contract, a copy of which is in the possession of third-party respondent, and a copy of which will be produced at the trial is hereby made a part hereof by reference as though fully set forth herein. That by the terms of the said contract, respondent impleaded agreed to perform from time to time general stevedoring services on any vessel designated by the respondent, United States of America. At Clause 12-a, the said contract provided in part as follows:

“The contractor shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers, or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents or employees in the performance of work under this contract. The general liability and responsibility of

the Contractor under this clause are subject only to the following specific limitations.”

Clause 12-b:

“The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons:

“(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

“(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents, or employees of the Contractor with specific directions of the Contracting Officer.”

V.

That on 14 October, 1954, pursuant to the terms of the said Contract No. DA-04-197 TC-2616, respondent, United States of America, requested respondent impleaded, Jones Stevedoring Company,

to discharge cargo from the USNS Private John R. Towle. That respondent impleaded, under the terms and conditions of the said contract, undertook the removal from the USNS Private John R. Towle of certain cargo and, for the purpose of performing such stevedoring services, took exclusive custody and control of the holds and hatchways in and about the said ship.

VI.

At the time of the alleged occurrence of the injuries described in the libel, respondent impleaded was engaged in performing work aboard the USNS Private John R. Towle, and in furnishing labor, services, material, equipment, supplies and facilities incident thereto, pursuant to and under the terms and conditions of Contract No. DA-04-197 TC-2616. That at the said time and place the hatchways and cargo areas about which libelant was working, and which were connected with the happening of the alleged injuries to the libelant, were in the sole and exclusive custody and control of respondent impleaded, its officers, agents and employees under the terms of the said contract. That if libelant was injured in the manner alleged in said libel, he was injured while performing work on board the said vessel in the course of his employment by respondent impleaded and in the performance of the said contract.

VII.

That if libelant sustained injuries as alleged in the libel, which is denied, such injuries sustained by libelant were solely and proximately caused by the

carelessness and negligence of respondent impleaded, its officers, agents and employees, and by their failure to perform in accordance with terms and conditions of Contract No. DA-04-197 TC-2616, in that the areas of the said vessel where libelant was working when allegedly injured were not provided with proper safeguards, and that respondent impleaded failed to use reasonable care for the prevention of accidents likely to occur in the absence thereof, due to the nature of the work then and there being undertaken; and by the improper, careless and negligent manner in which respondent impleaded, its officers, agents, employees, including the libelant, conducted themselves and their activities on board the said vessel.

VIII.

That if petitioner, United States of America, is under any liability by reason of any of the matters alleged in the libel herein, such liability was solely and proximately the result of fault and negligence and breach of contract on the part of respondent impleaded, Jones Stevedoring Company, its officers, agents and employees, including libelant; and that by reason thereof, any and all such liability should be borne by respondent impleaded in accordance with the terms and conditions of Contract No. DA-04-197 TC-2616 between respondent impleaded and petitioner herein above set out, and that respondent impleaded is liable to petitioner by way of full indemnity over.

IX.

That all and singular the premises are true and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against respondent impleaded citing it to appear and answer all and singular the matters alleged in this petition and in the libel herewith exhibited; that respondent impleaded be proceeded against as if originally made a party herein; that if the Court shall find that libelant is entitled to a decree for damages against petitioner, United States of America, then that petitioner have a decree, with costs, over against respondent impleaded for all damages and costs awarded libelant against petitioner; that the Court dismiss the said libel as against the petitioner with costs herein, and that petitioner may have such other and further relief and redress as to the Court may seem just.

LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the At-
torney General;

/s/ WILLIAM H. THORNTON, JR.,
Special Attorney, Department of Justice, Proctors
for Respondent, United States of America.

Affidavit of Mail attached.

[Endorsed]: Filed May 2, 1955.

[Title of District Court and Cause.]

ANSWER TO PETITION

Comes now Jones Stevedoring Company, respondent impleaded, and answering the petition of the United States of America, respondent herein, alleges as follows:

I.

Admits the allegations of article I.

II.

Admits the allegations of article II.

III.

Answering the allegations of article III, respondent impleaded denies all of the allegations contained in said libel marked "Exhibit A," and will answer the same at length hereinafter.

IV.

The allegations of article IV require no answer.

V.

Answering the allegations of article V respondent impleaded alleges that on or about January 1, 1954, it entered into a written contract with the United States of America for stevedoring services to be rendered by respondent impleaded. Said contract is referred to and all of the provisions of said contract designated DA-04-197 TC 2616 are referred to and incorporated herein by reference thereto as if the same were set forth herein at length.

VI.

Answering the allegations of the second paragraph numbered V, said respondent impleaded admits the allegations of said article.

VII.

Answering the allegations of article numbered VI, respondent impleaded denies the allegations contained therein.

VIII.

Answering the allegations of article numbered VII, respondent impleaded denies the allegations contained therein.

IX.

Answering the allegations of article numbered VIII, respondent impleaded denies the allegations contained therein.

X.

Answering the allegations of article numbered IX, respondent impleaded denies the allegations contained therein.

Further answering said petition herein, respondent impleaded alleges that at the time of the happening of said accident to libelant herein on October 14, 1954, said libelant was employed by respondent impleaded as a longshoreman and that said respondent impleaded had secured compensation insurance for the benefit and protection of its employees pursuant to the Longshoremen's and Harbor Workers' Compensation Act, Section 901, etc.; that pursuant to said provisions of the Longshoremen's and Harbor Workers' Compensation Act there has been paid

to said libelant as and for compensation, a total sum of \$145.00 and as and for medical benefits, the total sum of \$57.85; that the above-entitled court has no jurisdiction to award any damages over against this respondent impleaded in the event that said respondent United States of America is found guilty of carelessness or negligence in and about the operation and maintenance of said vessel USNS Private John R. Towle.

Answer to Libel

Comes now the respondent impleaded and answering the libel herein which was referred to in said petition and incorporated in said petition as follows:

As to the First Cause of Action:

I.

Admits that the vessel USNS Private John R. Towle was owned, managed, maintained, operated and controlled by the United States of America.

II.

Admits the allegations of article II.

III.

Admits the allegations of article III.

IV.

Admits the allegations of article IV.

V.

Answering the allegations of article V, said respondent impleaded denies that it in any way was

responsible for or caused injury to said libelant and denies the allegations of article V insofar as they refer to, charge or concern respondent impleaded. Specifically denies the respondent has been damaged in the sum of \$30,000.00 or in any other sum or sums or otherwise or at all.

VI.

Denies the allegations of article VI insofar as the same refer to, charge or concern this respondent impleaded.

VII.

Answering the allegations of article VII respondent impleaded admits that said libelant was earning approximately \$115.00 per week prior to his said accident and further answering the allegations of article VII this respondent impleaded alleges that it has paid compensation and medical benefits to said libelant pursuant to the Longshoremen's and Harbor Workers' Compensation Act and denies the remaining allegations contained in article VII.

VIII.

Answering the allegations of article VIII respondent impleaded alleges that pursuant to the Longshoremen's and Harbor Workers' Compensation Act, it has expended money for medical services to said libelant.

IX.

Respondent impleaded has no information concerning the allegations of article IX.

X.

Denies the allegations of article X.

As to the Second Cause of Action:

I.

Respondent impleaded refers to all of the admissions, denials and allegations contained in its answer to the first cause of action and incorporates the same herein by reference thereto as if the same were set forth herein at length.

II.

Answering the allegations of article II this respondent impleaded denies that it in any way caused the vessel to be unsafe or unseaworthy and denies the allegations contained therein as they refer to, charge or concern this respondent impleaded. Specifically denies that libelant has been damaged in the sum of \$30,000.00 or in any other sum or sums or otherwise or at all.

Wherefore, Jones Stevedoring Company, respondent impleaded, prays that said petition and libel be dismissed, together with its costs of suit.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent
Impleaded.

Duly verified.

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

ORDER

It Is Hereby Ordered that a decree be entered in the sum of \$2,000.00 in favor of the Libelant and against Respondent, United States of America, upon the first and second causes of action stated in the libel, in that the Respondent was negligent and that the vessel was unseaworthy.

A decree shall also be entered in favor of the Respondent-Impleaded, Jones Stevedoring Company, against the Respondent, United States of America, since the Respondent-Impleaded was not negligent or at fault in any manner contributing to the injury in whole or in part and could not have avoided the injury by the exercise of due diligence. The Libelant was not negligent or at fault in any manner, in whole or in part, and could not have avoided the injury by the exercise of due diligence.

/s/ O. D. HAMLIN,

United States District Judge.

Dated: August 22nd, 1955.

[Endorsed]: Filed August 22, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard before the Court on August 11, 1955, the Honorable Oliver

D. Hamlin, Judge, presiding, sitting without a jury. The libelant was present in person and represented by his counsel, Ewing Sibbett, Esq., of the firm of Gladstein, Andersen, Leonard & Sibbett, the respondent being represented by United States Attorney Lloyd H. Burke, Keith R. Ferguson, Special Assistant to the Attorney General, and William H. Thornton, Special Attorney, Department of Justice, and the respondent-impleaded being represented by Henry Schaldach, Esq. Thereupon oral and documentary evidence was introduced by and on behalf of each of the parties hereto and at the close of all of the evidence oral arguments were made by counsel for the respective parties, and the cause was thereupon by the Court taken under advisement, and the Court, having considered all of the testimony and the arguments of counsel and all of the evidence, and being fully advised in the premises, now makes the following

Findings of Fact

I.

It is true that on October 14, 1954, the USNS Private John R. Towle was a public vessel of United States and was during all of the times mentioned in the libel herein owned, managed, maintained, operated and controlled by respondent United States of America.

II.

It is true that at the time of the filing of the libel herein, and during all of the intervening times,

libelant was, and has been, a resident of the County of Alameda, State of California, and of the above-entitled district.

III.

It is true that petitioner United States of America is and was a sovereign nation.

IV.

It is true that at all times referred to in respondent's Petition to Bring in Third Party Under Rule 56, the Jones Stevedoring Company, a corporation, was and now is a corporation organized and existing under the laws of the State of California, and it is true that the corporation at all times referred to in said Petition and libel had a principal place of business in the City of San Francisco, State of California, and within the jurisdiction of this Honorable Court.

V.

It is true that on or about January 1, 1954, Jones Stevedoring Company, a corporation, respondent-impleaded, entered into a written contract with respondent United States of America, designated Contract DA-04-197 TC-2616, which said contract was at all times mentioned in the Petition herein in full force and effect, whereunder respondent-impleaded agreed to do certain stevedoring work; that the said contract provides in part as is alleged in Paragraph V of the impleading Petition of respondent United States of America.

VI.

It is true that on the 14th day of October, 1954, respondent-impealed was engaged in discharging cargo from the USNS Private John R. Towle pursuant to request by respondent United States of America; that respondent-impealed, through its agents, servants and employees, boarded the said USNS Private John R. Towle for the sole and exclusive purpose of providing stevedoring services and unloading cargo from said vessel. It is not true that respondent-impealed was in exclusive custody and/or control of the holds and hatchways in and about the said vessel.

VII.

It is true that on October 14, 1954, libelant was employed as a longshoreman aboard said vessel and libelant was then and there an employee of respondent-impealed Jones Stevedoring Company, with average weekly earnings of \$111.50, and was rendering services for the respondent United States of America in discharging cargo from said vessel, and that on said date said vessel was tied alongside a dock at Benecia, California.

VIII.

It is true that at the time of the injury to libelant, respondent-impealed was engaged in performing stevedoring operations aboard the USNS Private John R. Towle under said contract. It is not true that the respondent-impealed was in sole or exclusive or in any custody or control of the hatchway and cargo areas on said vessel about which or near

where libelant was working under the terms of or pursuant to said contract, or otherwise, or at all. It is true that libelant was injured aboard said vessel while performing work in the course and his scope of employment by respondent-impleaded.

IX.

It is true that on said date, at or about the hour of 9:15 a.m., and while libelant was engaged in the course and scope of his employment as a stevedore in the shelter deck number two hold of said vessel, libelant was caused to and he did slip on oil which had been permitted to accumulate on the said deck of said vessel, injuring libelant's left leg.

X.

It is true that by reason of the premises, said vessel was on October 14, 1954, in an unsafe and unseaworthy condition insofar as libelant was concerned.

XI.

It is true that said injury was solely, directly and proximately caused by the unseaworthiness of the said vessel and the negligence and carelessness of the respondent, United States of America, its agents and employees, in permitting said oil to accumulate on said deck, well knowing of the presence of said oil on said vessel, such presence constituting a hazard to libelant and other persons working on said deck.

XII.

It is true that as a result of such injuries, libelant was unable to engage in his usual occupation as a

longshoreman for a period of approximately five weeks. It is true that although libelant has been working regularly since he returned to work approximately five weeks after said accident, libelant continues to suffer some impairment of motion and some discomfort in his left knee.

XIII.

It is true that for the first three or four weeks following said accident, libelant suffered severe pain as a result of said injury and libelant continues to suffer some discomfort in his left knee.

XIV.

It is true that libelant received workmen's compensation benefits from the insurance carrier for respondent-impleaded, Jones Stevedoring Company, in the amount of \$145.00, and medical services were furnished by said carrier for said injury in the reasonable sum of \$162.85.

XV.

It is true that libelant was entirely free from any negligence on his part in connection with the aforementioned accident, and that said accident was caused solely by the negligence and carelessness of respondent United States of America, its employees and agents, and in the failure of said vessel to furnish libelant with a safe and seaworthy vessel upon which to perform his duties as a stevedore.

XVI.

It is not true that said injury to libelant was solely and/or directly and/or proximately caused by

the carelessness and/or negligence of Jones Stevedoring Company, its officers, agents and employees. It is not true that Jones Stevedoring Company failed to perform in accordance with the terms and conditions of Contract No. DA-04-197 TC-2616. It is not true that the areas of said vessel where libelant was working when injured were not provided by said Jones Stevedoring Company with proper safeguards, and it is not true that Jones Stevedoring Company failed to use reasonable care for the prevention of accidents likely to occur for any reason. It is not true that libelant's injuries were caused or contributed to in whole or in part by the improper and/or careless and/or negligent manner in which respondent-impleaded, its officers, agents or employees, conducted themselves or their activities on board said vessel.

XVII.

It is true that all and singular the premises are within the admiralty and maritime jurisdiction of the above-entitled Court.

XVIII.

From the foregoing recitation and Findings of Fact, the Court makes the following

Conclusions of Law

I.

That this Court has jurisdiction of the parties and the subject matter herein by virtue of the Public Vessels Act (46 U.S.C.A., s.s. 781, 790).

II.

That by reason of the premises, said vessel was, on October 14, 1954, in an unsafe and unseaworthy condition insofar as libelant was concerned.

III.

That the injury to libelant was solely and proximately caused by the negligence of the respondent and the unseaworthiness of the vessel.

IV.

That libelant was not negligent or at fault in any manner contributing to the injury in whole or in part and could not have avoided the injury by the exercise of due diligence.

V.

That there was no negligence or fault on the part of respondent-impleaded, Jones Stevedoring Company, a corporation, which proximately, or to any degree or extent, or jointly with the unseaworthiness of the vessel, or at all, caused or contributed to the said accident or injuries to said libelant.

VI.

That the respondent-impleaded, Jones Stevedoring Company, could not have avoided the injury to libelant by the exercise of due diligence.

VII.

That libelant is entitled to a decree for damages against respondent United States of America in the total sum of \$2,000.00.

VIII.

That libelant is entitled to recover his costs of suit herein.

IX.

That the respondent-impleaded, Jones Stevedoring Company, is not liable to libelant nor to respondent United States of America for the whole or any part of said loss or damage.

X.

That the respondent-impleaded, Jones Stevedoring Company, a corporation, is entitled to a Decree of Dismissal of the Petition of the United States of America to Bring in Third Party Under Rule 56.

Dated: September 13, 1955.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed September 13, 1955.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 27015 in Admiralty

BENJAMIN HARRISON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

JONES STEVEDORING COMPANY,

Respondent-Impleaded.

DECREE

This cause came on regularly to be heard before the Court on August 11, 1955, the Honorable O. D. Hamlin, Judge, presiding, sitting without a jury. The libelant was present in person and represented by his counsel, Ewing Sibbett, Esq., of the firm of Gladstein, Anderson, Leonard & Sibbett, the respondent being represented by United States Attorney Lloyd H. Burke, Keith R. Ferguson, Special Assistant to the Attorney General, and William H. Thornton, Special Attorney, Department of Justice, and the respondent-impleaded being represented by Henry Schaldach, Esq. Thereupon oral and documentary evidence was introduced by and on behalf of each of the parties hereto and at the close of all of the evidence oral arguments were made by

counsel for the respective parties, and the cause was thereupon by the Court taken under advisement, and the Court, having made and filed its Findings of Fact and Conclusions of Law herein:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the libelant above named, Benjamin Harrison, do have and recover of and from the respondent, United States of America, the sum of Two Thousand Dollars (\$2,000) plus costs of suit;

It Is Further Ordered, Adjudged and Decreed that respondent United States of America, a sovereign, take nothing from respondent-impleaded, Jones Stevedoring Company, a corporation, on its Petition to Bring in Third Party Under Rule 56; and It Is Further Ordered, Adjudged and Decreed that said Petition to Bring in Third Party be and it is hereby dismissed.

Dated: September 13.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed September 13, 1955.

Entered September 14, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

To: Gladstein, Anderson, Leonard & Sibbett and
Ewing Sibbett, Esquire, 240 Montgomery Street,
San Francisco, California, Proctors for Libel-
ant;

To: John H. Black and Edward R. Kaye, and
Henry Schaldach, Esquires, 233 Sansome Street,
San Francisco, California, Proctors for Re-
spondent-Impleaded:

Please Take Notice, that the United States of America, respondent in the above-entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from all that part of the Decree of this Court entered and filed with the Clerk of the above-entitled Court, on September 13, 1955, which orders, adjudges and decrees that respondent United States of America take nothing from respondent-impleaded, Jones Stevedoring Company, a corporation, on its Petition to Bring in Third Party under Rule 56, and from all of that part of said Decree of this Court entered and filed with the said Clerk of the above-entitled Court on September 13, 1955, which orders, adjudges and decrees that said Petition to Bring in Third Party be dismissed and from every part of said portion of said Decree.

LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,

Special Assistant to the At-
torney General;

/s/ WILLIAM H. THORNTON, JR.,

Special Attorney, Department
of Justice.

Affidavit of Mail attached.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

The above-named respondent, United States of America, who is petitioner and appellant herein, not having designated the complete record and all the proceedings and evidence in the action for inclusion in the record on appeal, hereby assigns errors in the proceedings, Findings of Fact and Conclusions of Law and Final Decree and states the points upon which it intends to rely on appeal as follows:

I.

The District Court erred in finding and holding that the libelant's injury was solely and proximately caused by appellant's negligence and the unseaworthiness of the USNS Private John R. Towle.

II.

The District Court erred in finding and holding that there was no negligence or fault on the part of appellee, Jones Stevedoring Company, which proximately or to any degree or extent, or jointly with

the unseaworthiness of the USNS Private John R. Towle, or at all, caused or contributed to the accident or injuries of the libelant.

III.

The District Court erred in finding and holding that appellee could not have avoided injury to the libelant by the exercise of due diligence.

IV.

The District Court erred in failing to find and hold that appellee is liable to indemnify the appellant as a matter of general law.

V.

The District Court erred in failing to find and hold that appellee is liable to indemnify appellant pursuant to the express terms of Contract DA-04-197 TC-2616.

VI.

The District Court erred in dismissing appellant's Impleading Petition.

LLOYD H. BURKE,

United States Attorney;

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney General;

/s/ WILLIAM H. THORNTON, JR.,

Special Attorney, Dept. of Justice.

Affidavit of Mail attached.

[Endorsed]: Filed March 1, 1956.

The United States District Court, Northern District
of California, Southern Division
No. 27015

BENJAMIN HARRISON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

JONES STEVEDORING CO.,

Impleaded-Respondent.

Before: Hon. Oliver D. Hamlin, Judge.

REPORTER'S TRANSCRIPT

Thursday, August 11, 1955

Appearances:

Proctors for Libelant:

GLADSTEIN, ANDERSEN, LEONARD
& SIBBETT, by
EWING SIBBETT, ESQ.

For the Respondent, United States of America:

LLOYD H. BURKE,
U. S. Attorney, by
WILLIAM H. THORNTON, JR., ESQ.,
Special Assistant.

Proctors for Respondent-Impleaded:

JOHN H. BLACK, and
EDWARD R. KAY, by
HENRY SCHALDACH, ESQ.

The Clerk: Benjamin Harrison, Libelant, versus United States of America and Jones Stevedoring Co., Respondents, for trial.

Will respective counsel please state their names for the record?

Mr. Sibbett: For the libelant, Ewing Sibbett.

Mr. Thornton: For the respondent, William H. Thornton, Jr.

Mr. Sibbett: I might say, Judge, there is another party in this proceeding. There is a complaint in intervention, Mr. Schaldach representing the Stevedoring Co. He said he would be a little late.

(Discussion between Court and counsel omitted.)

The Court: Proceed.

Mr. Sibbett: May it please the Court, this is a longshoreman's libel in personam for personal injuries suffered on October 14th of last year while the longshoreman was working aboard a government vessel, the SS Private John R. Towle. The libel is in two counts, the first count being based on negligence, alleging that the injuries were suffered as a result of the negligence of the United States and its representatives in failing to provide a safe place for the longshoreman to work.

The second count is based on absolute obligation, or unseaworthiness, charging that the vessel was unseaworthy. [3*]

The United States has impleaded the Stevedoring Company that was the employer of the longshore-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

man at the time of the accident, alleging that, in substance, if there is any liability in this case on the part of the Government that by contract between the Government and the Stevedoring Company the Government has a right over against the Stevedoring Company. Mr. Schaldach represents the Stevedoring Company.

Do you gentlemen have any statement to make at this time?

Mr. Thornton: No.

Mr. Schaldach: No.

Mr. Sibbett: Will you take the stand, Mr. Harrison?

BENJAMIN HARRISON, JR.

the libelant herein, called as a witness in his own behalf, sworn.

The Court: State your name, please.

A. Benjamin Harrison, Jr.

Direct Examination

By Mr. Sibbett:

Q. Where do you live, Mr. Harrison?

A. 843-60th Street, Oakland, California.

Q. Will you speak up a little bit or move closer to the microphone so we all can hear you. We all have to hear you back here.

A. 843-60th Street, Oakland.

Q. How old are you, sir? [4] A. 39.

Q. Are you married or single?

A. At the present time I am married.

Q. But you are separated from your wife, as I understand it? A. That is right.

(Testimony of Benjamin Harrison, Jr.)

Q. Were you and your wife living together at the time of this accident? A. Yes, we were.

Q. What is your present occupation?

A. Stevedore.

Q. How long have you been a stevedore?

A. January 27, 1944.

Q. Has that been your only and continuous occupation since that date? A. It has.

Q. Has all that work been here in the Bay Area?

A. Yes, around this area.

Q. In other words, you haven't worked in ports in the South and the Gulf or Seattle or any place but San Francisco?

A. Since that particular date?

Q. No, since you went to work.

A. I worked four days in Pedro since that time, during 1950, when work was slack.

Q. With that small exception your work has always been around in the Bay Area? [5]

A. That is right.

Q. Can you tell us briefly what type of work you did before you were a longshoreman and when you went to work?

A. I worked in the shipyards here, Bethlehem Shipyard over in Alameda, as a welder. And I worked at Moore's Shipyard here back in 1943 as a welder. Before that I worked for a company in New Orleans, Louisiana, about ten or eleven years.

Q. Have you ever done any work in and about garages and in and about automotive equipment?

A. I do most all my mechanical work myself.

(Testimony of Benjamin Harrison, Jr.)

Q. Are you familiar with automobile engines and transmissions and differentials?

A. Well, I am acquainted with most all types of work in many types of a car. Anything that gets wrong with my car, I do all my work. I can put my hand on exactly what is wrong.

Q. As I understand it, Mr. Harrison, on October 14th of last year you were dispatched by the longshore hiring hall to work aboard the SS John R. Towle, is that correct? A. That is right.

Q. Where was that vessel at that time?

A. Benecia.

The Court: Where? Benecia?

A. Yes.

Q. (By Mr. Sibbett): What time did you and your fellow workmen board that vessel on that [6] morning?

A. Well, when we go to Benecia we usually go about 7:00 and get there about 8:30—8:00 o'clock. Start working at 8:00 o'clock.

Q. Is that your best recollection as to the approximate time you went to work this particular morning?

A. On the ship you start to work at 8:00 at most all jobs.

Q. You were a member of a longshore gang at that time, is that right? A. That is right.

Q. Who was your gang boss or gang foreman?

A. Mr. C. Jensen.

Q. Do you recall what particular hold of that vessel you were assigned to work that morning?

(Testimony of Benjamin Harrison, Jr.)

A. Hatch No. 1.

Q. And when you went to work that morning at hatch No. 1, was the hatch opening of the main deck open or did you have to open it up?

A. It was open.

Q. Where were you sent below, what deck, to work? A. Shelter deck.

The Court: What deck?

A. Shelter deck.

Q. (By Mr. Sibbett): That is the deck immediately below the main deck? A. Yes.

The Court: I still didn't get it. [7]

Mr. Sibbett: Shelter deck, your Honor.

Q. And was the work of your gang that particular day to be loading cargo or discharging cargo from that hatch? A. Discharging cargo.

Q. What type cargo was on the shelter deck that morning which you were to discharge?

A. Jeeps.

Q. Jeeps? A. Yes.

Q. Were these, so far as you could tell, military jeeps? A. Oh, yes. Army jeeps.

Q. And how were these jeeps stationed there in that shelter deck when you went down there?

A. These jeeps were double decked. In other words, one front end at the back end of another.

Q. In other words, there would be one jeep with four wheels on the deck, is that correct?

A. Yes.

Q. And another with two?

A. Up on the other.

(Testimony of Benjamin Harrison, Jr.)

The Court: Up on what?

A. In the body of another jeep.

Mr. Sibbett: In the bed of the forward jeep.
“Piggyback,” I guess, you might term it.

Q. And was the whole shelter deck filled with these jeeps when [8] you went down there?

A. It were.

Q. How were these—strike that.

Were these jeeps tied together in any way so that they wouldn't move during transit?

A. Yes, they have them lashed with wire and we have to cut them loose.

Q. Lashed with wire and you have to cut them loose? A. Yes.

Q. When you went down there that morning onto that deck, did you notice anything unusual or out of the ordinary about the condition of the deck itself?

A. Yes, I notice a lot of oil was on the deck and all around on the floor.

Q. On the floor or on the deck? A. Yes.

Q. What kind of oil did this appear to be? I mean, was it grease or was it liquid oil?

A. Well, it's a liquid, a regular machine oil like lubricating.

Q. Was it all over the deck or just in patches?

A. Well, it was covered mostly over the whole deck.

Q. Could you tell by your own observation where this oil was coming from or had come from?

A. To my estimation it came out of the transmis-

(Testimony of Benjamin Harrison, Jr.)

sion and the crankcase; in other words, just like you have a main bearing [9] leaking oil underneath your car.

Q. With your experience with automotive engines as you have told us about, did it appear to you this oil had come from the jeeps?

A. Yes, it had.

Q. When you went down and observed this condition of the deck that you have told us about, what, if anything, did you do about it?

A. The first thing, I spoke about getting sawdust.

The Court: I didn't hear that. Read it.

(Answer read by the reporter.)

Q. (By Mr. Sibbett): Who did you speak to about that? A. My foreman, Mr. Jensen.

Q. What did Mr. Jensen do, if anything?

A. He said, "Well, I will ask the walking boss to see if we can get some."

Q. Then, as I understand it, Mr. Jensen was down on the shelter deck with you at that time?

A. No, he was over the hatch.

Q. Looking down the hatch?

A. At the present time looking down when I saw this.

Q. Then did he disappear for a few minutes?

A. Yes, he disappeared for a few minutes and come back and replied the walking boss said they didn't have any.

Q. Then what, if anything, transpired? [10]

(Testimony of Benjamin Harrison, Jr.)

A. I told him to try to get some sand or something because the deck was pretty slippery with all the oil around the deck, and he went off and came back in a short while and didn't have any sand. The walking boss said to take it easy, "We must do the best we can, take it easy."

Q. Was there any discussion at that time between—strike that.

How many men were working with you in the hold on that particular morning?

A. On this job, six men. Six of us.

Q. And in addition the gang boss?

A. Yes. Two winch drivers.

Q. After the gang boss came back and said they didn't have any sand, either, was there any other discussion about this condition?

A. Well, he said, "Well, maybe we should knock off, but it is up to the men. What should we do?" So the walking boss said, "Well, take it easy. Do the best we can. We will try to get it out."

Q. "Try to get it out," meaning the jeeps?

A. Yes. "Take your time."

Q. Then did you proceed to discharge the jeeps from that shelter deck?

A. Yes, we proceeded on with the operation.

Q. And did you get them all out of there without incident? [11]

A. We got them all out of the shelter deck and started to uncover.

Q. You will have to explain to us what you mean

(Testimony of Benjamin Harrison, Jr.)

by "uncover." I don't think any of us have done longshore work. What do you mean?

A. Going down to the next deck below the shelter deck.

Q. In other words, you got all the jeeps out of the shelter deck and you were preparing to go down to the next deck, is that correct? A. Yes.

Q. And as I understand it——

Mr. Sibbett: Gentlemen, if I lead a little bit on the mechanics of this thing, object at any time. I think it might facilitate things.

Q. (By Mr. Sibbett): As I understand it, that involves first of all taking off the wooden hatch boards that fit in between steel beams.

A. Yes.

Q. Did you get all those hatch boards off?

A. Yes, we did. Started taking off the strongbacks.

The Court: Started what?

A. Taking out the strongbacks.

Q. (By Mr. Sibbett): As I understand it, Mr. Harrison, the strongbacks are the big steel beams which run across the hatch opening athwartship, and there are four, five, six of [12] them, depending on the size of the hatch opening.

The function of these big hatch beams is two-fold: One, to constitute a lateral support while the ship is at sea, to strengthen that deck because there is a big square opening there; and also to support the hatch boards in between so that there is a completely closed area there, is that correct?

(Testimony of Benjamin Harrison, Jr.)

A. That is correct.

Q. Did you and partners start to take out one of these strongbacks or strong beams?

A. We had taken out three strongbacks, and had four in that deck.

Q. There were four on that deck?

A. Yes. Four beams. We were laying the last beam on the inshore side to turn it over.

Mr. Sibbett: Just a minute. At this point, I think, to assist the Court in visualizing all these beams, will you—well, would you mark this for identification, first?

The Court: Libelant's Exhibit 1 for identification.

(Whereupon, photograph referred to above was marked Libelant's Exhibit No. 1 for identification.)

Q. (By Mr. Sibbett): Now, Mr. Harrison, I will show you a photograph which the Government has taken of other strongbacks. That isn't the strongback that was on this particular ship on this particular morning, but the Government states that it is their understanding that they are substantially the same type [13] as the strongbacks we have been talking about.

I will ask you to look at this photograph and tell me—this photograph shows three strongbacks lying along the bulwark of the vessel. Are these the type of strongbacks you were handling on that particular morning?

A. Yes, they are.

(Testimony of Benjamin Harrison, Jr.)

Mr. Sibbett: I will ask that this be marked as Libellant's exhibit in evidence.

The Court: It may be admitted and marked with the same number.

(Thereupon, Libellant's Exhibit No. 1, formerly marked for identification, was admitted into evidence.)

The Court: Do you want to examine him about it?

Mr. Sibbett: No. It is just so your Honor will have the general idea (handing exhibit to the Court).

Q. All right, Mr. Harrison, we have you and your partner starting to handle the last of the four strong beams. As I understand it, of course, these are much too heavy to handle by hand. The winch driver drops a bridle down and that is hitched onto each end of the strongback, and he pulls the strongback out of the slots to raise it out of the slots it is resting in, and a longshoreman on one end of the beam and a longshoreman on the other end of the beam assists the winch driver in taking it alongside of the hatch opening and putting it down on the deck, is that correct? [14]

A. That is right. We assist him in landing the strongback in the wing.

Q. As you were assisting the winch driver on this particular day, in this particular instance, and getting this last strongback off into the wing and off

(Testimony of Benjamin Harrison, Jr.)

away from the hatch opening, tell us in your own words what happened.

A. My partner and I landed the strongback in the wing of the ship and unhooked the bridle which was used to bring out the beam, let the winch driver go, and my partner and I attempted to turn, and slipped over.

Q. You were going to attempt to put it on its side?

A. Yes. We started, at which time the beam started tilting over and I started to slip under and it fell across my leg.

The Court: It fell on your leg?

A. Yes.

Q. (By Mr. Sibbett): You started to slip as you and your partner were tilting the beam over to rest it on its side, is that correct?

A. Yes. As the beam started to come over I would slip underneath the beam at the same time.

Q. What caused you to slip, if you know?

A. Well, it had grease around the deck, and by walking around my shoes were oily on the bottom. Putting pressure to turn those beams over, well, that grease made it slide, lose your balance and slide underneath the beam. [15]

Q. How did you fall?

A. I fell on my back. As we were turning the beam over I fell smack on my back. My leg went under the beam as the beam was coming over.

Q. Did the beam fall on you?

A. Yes, pinned me to the deck.

(Testimony of Benjamin Harrison, Jr.)

Q. What part of your body did the beam fall on?

A. On my leg, and across my knee.

Q. Which leg? A. Left leg.

Q. What did you do after that?

A. Well, the men rushed—I hollered and the men rushed to pick the beam off my leg, and then sent for a basket because I couldn't get up, and carried me out.

Q. How did they send in the basket?

A. By the winch driver.

Q. Just like you would bring in cargo?

A. That is right.

Q. How did you get into the basket?

A. Well, my fellow brothers that I work with put me in the basket.

Q. And then the winch driver——

A. Hoisted me out on the dock.

Q. Swung you over and put you down on the dock, is that correct? [16] A. Yes.

Q. At this particular time were you in any pain?

A. Yes, my leg were hurting me terrible because there was a big hole bruised in it, and the weight of that beam had located on my knee and the sharp edge of the beam was resting on the femur of my leg.

Q. What do you mean by the femur of your leg?

A. That is the thigh bone. Because the knee bone were under the beam, holding the weight, and further back the sharp edge of that beam were way back further above my knee.

Q. By "femur," you referred to your thigh bone,

(Testimony of Benjamin Harrison, Jr.)

is that right? A. That is right.

Q. Was there any bleeding or any cut around your knee?

A. Just bruised in front of my knee.

Q. What about the under part of your knee?

A. Blew a hole in the back of my knee.

Q. That, of course, hadn't been struck by the strongback?

The Court: What do you mean by a hole in the back of your leg?

A. Compression of the beam, by being heavy and fell on my knee, bruised the back of my knee.

The Court: The skin was broken?

A. Big hole in it.

Q. (By Mr. Sibbett): In other words—well, strike that. How long did you remain in the basket on the dock before [17] the ambulance came?

A. The ambulance at Benicia come and got me.

Q. How long a time was it, do you remember?

A. Well, I would estimate about 10 or 15 minutes.

Q. And where were you taken first by the ambulance?

A. At Benicia first aid, I imagine, they call it.

Q. Some place in Benicia, is that correct?

A. Yes, some place in Benicia.

Q. What, if anything, did they do for you there?

A. The doctor looked at my leg there, wrapped my leg up in bandages and said I required surgery, and he gave me a paper to the Stevedoring Company.

(Testimony of Benjamin Harrison, Jr.)

Q. Well, we are not concerned about that. We just want to know what the doctor did for your leg.

A. He looked at my leg and gave me first aid.

Q. Tell us what you mean by first aid.

A. Asked me were I in pain and I told him, "Yes." He wrapped my leg up with bandages, said he didn't have no place for no surgery there, I would have to go to the doctor where they do surgery.

Q. Was the side of your knee bleeding at that time? A. Well, no, it wasn't bleeding.

Q. I am talking about the under side, not the upper side.

A. Well, no, nothing to amount to nothing.

Q. Then where did they take you? [18]

A. They taken me to the Alameda—to Dr. Jones' office.

Q. They first took you to a doctor's office, is that right, not to the hospital? A. Yes.

Q. What did Dr. Jones do for you?

A. Well, he said——

Q. (Interposing): Not what he said, Mr. Harrison, but just what he did.

A. He taken me over to the Alameda Hospital.

Q. He didn't do anything right there?

A. No, he didn't do any surgery there. Taken me to the Alameda Hospital.

Q. How long were you in the Alameda Hospital?

A. About half an hour in the X-ray room. Into the X-ray room first.

Q. Yes. What next?

(Testimony of Benjamin Harrison, Jr.)

A. Then carried me to the ward, said the doctor was out at the present time, they would have to have surgery.

Q. When did they have the surgery, as you recall it?

A. Oh, about an hour or two when I was there in the room they brought me into surgery.

Q. Do you know what they did to you?

A. Yes, they cut out some of the bad flesh in my leg.

Q. Where was that?

A. That was in the hospital. [19]

Q. I mean, what part of your knee?

A. Oh, the under side.

Q. You say they cut off some of the loose flesh?

A. Yes, the bruised flesh, and sewed my leg up.

Q. Were you under some sort of anesthesia when that was done?

A. Well, yes, they put anesthetic in the leg at the same time before they sewed it up.

Q. So you didn't feel anything on that?

A. Once in a while I would feel when the needle would strike where it wasn't dead and he would put some more anesthetic down there.

Q. They bandaged up your leg and put you to bed?

A. Yes.

Q. When were you released from the hospital?

A. Next morning Dr. Jones tell me I could go home.

Q. How did you get home?

(Testimony of Benjamin Harrison, Jr.)

A. A neighbor of mine come and got me, and I had crutches to assist myself on.

Q. When you got home did you go to bed or did you stay up with your crutches?

A. I stayed up in a chair around the house.

Q. Well, during the first three or four days was that knee paining?

A. Yes, it was in pain for quite a few days. About four or five days. And then I would have to go back to the doctor's [20] office every two days to have that leg treated.

Q. Were you having any difficulty in sleeping that first week or so?

A. Yes, I couldn't sleep and I mentioned to the doctor about it and he said, well, I will have to get some pills to ease the pain.

Q. When did he first give you these pills?

A. He didn't give them to me until about three or four days after I mentioned what great pain I had day and night times, how the leg was thumping and hurting, so he had to give me some pills and resting tablets to ease the pain.

Q. Did those pills help you?

A. Yes, they did.

Q. How long did you use the pain pills?

A. About a week.

Q. Do you remember about when it was you were able to return to work?

A. Around November.

Q. I might say, Mr. Harrison, we have the pay-

(Testimony of Benjamin Harrison, Jr.)

roll records here which indicate you went back to work November 20th. Would that be about it?

A. Yes. Between five and six weeks.

Mr. Sibbett: I think, Judge, we can stipulate to that date as the date of return to work.

Q. How long during that period that you were off work did you [21] have to use the crutches?

A. About three weeks.

Q. And then after you discontinued the crutches were you able to get around without using a cane?

A. Well, I would limp to my car, make it to my car and go to the doctor for treatment; try to put as much weight as possible, because the doctor told me to put as much weight as possible and use my leg, so I tried to eliminate the crutches as much as possible.

Q. You tried to use the leg as much as you could as the doctor said, is that right?

A. Yes.

Q. How often did you go to the doctor's office in Alameda while you were off work?

A. Twice a week.

Q. What treatment, if any, did you receive when you went to the doctor's office?

A. That leg hadn't completely healed. It had a hole in there yet. Put healing power on that leg and dress it.

Q. He would dress it?

A. Yes, until that hole filled in.

Q. Did you get any heat treatments during this period of time?

(Testimony of Benjamin Harrison, Jr.)

A. Not until after my leg healed.

Q. Until after you returned to work, is that [22] right? A. Yes.

Q. After you returned to work November 20th of last year, did you still continue going to the doctor for treatment? A. Yes, I did.

Q. Did you continue going about twice a week or did you step it down to once a week?

A. I was going there twice for a while and then——

Q. (Interposing): Until how long?

A. I would say maybe about two or three weeks.

Q. After you returned to work? A. Yes.

Q. Then he stepped it down to once a week?

A. Yes.

Q. What was done for you on those once a week visits?

A. They was giving me heat treatments.

Q. To your left knee? A. Yes.

Q. How long a period was it you went to the doctor once a week?

A. About, well, I imagine about three months.

Q. That would bring you into the latter part of January or early February?

A. Around about March, I imagine. March or April.

Q. When is the last time you went to the doctor and received a treatment—the approximate [23] month?

A. I think March. I wouldn't know exactly.

Q. During that time you were receiving heat

(Testimony of Benjamin Harrison, Jr.)

treatments, is that correct? A. Yes.

Q. Now, after you returned to work did your knee and left leg continue to bother you or not?

A. Yes, it stays stiff in the joint.

Q. I will ask you in a minute if there is anything wrong with it now, but the first three or four months you were working and going to the doctor?

A. What was the question?

Q. After you returned to work on November 20th did your knee bother you, and, if so, how did your knee bother you? That is right after you returned to work.

A. If I sat down a long time it would get stiff in the joint. I would get up, I would have to walk a block or two before it seems like it gets back to normal.

Q. When you first returned to work, did you have any pain in the area of your knee—when you first returned to work? A. Well, not bad.

Q. As I understand it, you were able to do your work, is that correct? A. Yes, I were.

Q. Since that time you haven't had to take any time off from work because of your knee, is that right? [24] A. No, I haven't.

Mr. Sibbett: Now, I might say, Judge, that we have a wage statement from the Pacific Maritime Association, and counsel have stipulated that if the records were subpoenaed the records would show as indicated on this recap.

I will offer the recapitulation into evidence. Counsel have already seen it and examined it.

(Testimony of Benjamin Harrison, Jr.)

The Court: Libelant's Exhibit 2.

(Whereupon, recap referred to above was received in evidence and marked Libelant's Exhibit No. 2.)

Mr. Sibbett: That record shows, Judge, that for the 24-week period immediately preceding the accident Mr. Harrison's average weekly earnings were \$111.50. His average weekly earnings.

Q. (By Mr. Sibbett): Now, Mr. Harrison, does your knee bother you at all at the present time, and, if so, how?

A. It gets a little stiff at times from sitting around and I have to walk around and open it back up before it seems normal.

Q. As I understand it, you have no difficulty whatsoever in extending the knee out?

A. No, none at all.

Q. That is perfectly normal?

A. That is right. [25]

Q. Do you have any difficulty when you attempt to make a squat? What happens then?

A. Yes, it hurts right at the knee joint.

Q. Had you ever received any injury before this time to that leg any place? A. No, never.

Mr. Sibbett: That is all.

Cross-Examination

By Mr. Thornton:

Q. Mr. Harrison, for whom were you working on October 14th, 1954?

A. Jones Stevedoring Company.

(Testimony of Benjamin Harrison, Jr.)

Q. Who was your immediate superior, your immediate boss? A. Mr. C. Jensen, Gang 189.

Q. For whom was he working?

A. Jones Stevedoring Company.

Q. Now, as I understand your testimony, Mr. Harrison, when you went aboard the ship that morning the hatch to the front 'tween deck was already open, is that correct? A. Yes.

Q. Do you know who opened that hatch?

A. No, I didn't.

Q. Was there anybody working the hatch when you went aboard? A. No, there were not.

Q. When you went below and noticed this oil on the deck, did it appear to you to be old oil or new oil? [26]

A. Old oil. In other words, burned oil. Seemed like burned oil out of a car.

The Court: Seemed like what?

A. Old oil.

Q. (By Mr. Thornton): What caused you to reach that conclusion, Mr. Harrison?

A. Because it was so dark.

Q. Was this oil in spots around the deck?

A. It was over mostly all the deck.

Q. Did you call the attention of your boss to the presence of this oil? A. I did.

Q. How did you do that, Mr. Harrison?

A. I said I went into the gaffer—that's the boss, Mr. Jensen. If we don't see a gaffer we call a winch driver.

Q. Did you see a gaffer on this occasion?

(Testimony of Benjamin Harrison, Jr.)

A. Yes, I did.

Q. Where was the gaffer?

A. He was on deck.

Q. Looking down the hatch?

A. No, he came. When I asked for him he came over and looked down.

Q. What did you say?

A. "Get us some sawdust. There's a whole lot of oil on this deck down here." [27]

Q. Is the gaffer Jensen? A. Yes.

Q. Did he get your sawdust?

A. He said, "I will see what there is," and he went off and come back and replied they didn't have any.

Q. How long was it before Jensen came back?

A. Oh, I would say maybe about five minutes.

Q. What were you doing during that period of time?

A. We was still down there cutting wires loose off the jeeps.

Q. How many of you were down below?

A. Six.

Q. And what happened when Jensen told you there was no sawdust?

A. Told him to get us some sand, something.

Q. Did Jensen go away then? A. Yes.

Q. How long was it before he came back that time? A. Oh, about five minutes.

Q. What did he say that time?

A. Walked up, said, "Didn't have any sand, either. Just take it easy, the walker said."

(Testimony of Benjamin Harrison, Jr.)

Q. Is that the time he told you to take it easy and, "Do the best we can"?

A. After they didn't have any sawdust or sand.

Q. What did that mean to you? [28]

A. In other words, not rush ourselves. Be careful. Take out time. In other words, when a fellow says, "Take it easy."

Q. Did you take it easy?

A. Try to be as careful as possible.

Q. Did you remove some of the jeeps from the shelter deck then?

A. We did continue with the operation and set them all out on the shelter deck.

Q. And cleared the shelter deck?

A. That is right.

Q. And started to open the hatch to the lower 'tween deck?

A. That is right.

Q. Was the gaffer present when the hatch was being opened?

A. Yes, he was on deck.

Q. He was supervising the job?

A. Yes. He is on that particular hatch.

Q. And these hatch beams that you referred to, were they on a bridle and taken out of the slots by the winch?

A. That is right.

Q. And they were landed in——

A. (Interposing): In the wing of the ship.

Q. That is beyond the coaming?

A. That is abreast.

Q. When these hatch beams were landed, were they landed on their edge? [29]

A. Yes. They have a flat bottom and we always

(Testimony of Benjamin Harrison, Jr.)

land them on the edge if they are going to take it back down——

Q. (Interposing): About how tall were these hatch beams when standing up?

A. I would estimate two and one-half or three feet.

Q. And do you know what one weighs?

A. I wouldn't know exactly. I just estimate about 1,500. That is a rough estimate.

Q. That is a half a ton or more?

A. Be a half a ton. Two thousand would be a ton.

Q. It would be less than a ton?

A. To my estimate. I don't know exactly. Maybe heavier.

Q. Will you tell us how you turned that hatch beam over?

A. We landed the beam with the assistance of the winch driver on edge like it is standing—on the flat bottom.

The Court: By "on edge" what do you mean?

A. On that flat bottom. That particular beam will stand.

The Court: Well, looking at this picture here, do you mean this part would be flat down on the ground—on deck?

A. No, I mean this part here (indicating). It is a flat bottom and here that beam will stand right there (indicating).

The Court: Here?

A. No, this one. This one here. There is a block and a rope tied around that one. That is

(Testimony of Benjamin Harrison, Jr.)

the same beam, you understand. That will stand, too. [30]

The Court: I don't understand it, Mr. Harrison. Is this what you mean by the bottom (indicating on photograph)?

A. Yes, but that beam is on an angle. It is shaped like a "V." Right in the middle here it is flat. That beam will stand up just like this picture is standing (demonstrating).

The Court: It stands on this part and not that part?

A. Not that part. That is the top of the beam.

The Court: I see.

Mr. Sibbett: That is the way the winch driver has to take it out of the hatch.

The Court: The curve part of the beam is on the bottom as you take it out?

The Witness: That is right.

Q. (By Mr. Thornton): In other words, Mr. Harrison, this beam was standing just about the way it would be if it were in the slot across the hatch? A. Exactly.

Q. What did you do from then on?

A. We had the hatch, turned it back down. After we unhooked the bridle, we had landed a beam, unhooked the bridle—hooked the bridle and let the winch driver pick it up. My partner and I attempted to turn the beam.

The Court: On its side?

A. On its side. This would be the beam here

(Testimony of Benjamin Harrison, Jr.)

coming over. I slipped right on the edge of this beam and the beam fell on [31] my leg.

Q. (By Mr. Thornton): Why did you want to turn the beam over?

A. Safety. The vibration of the ship, if that beam was standing straight up, the vibration, that beam it would turn over and go back in the hold.

Q. Isn't it customary, Mr. Harrison, to have the winch turn those beams over and you guard it?

A. The winch on those particular hatches can't turn those beams over.

Q. Is there anything in this particular hatch that made that impossible?

A. Yes, it was pretty close to the coaming where it landed.

Q. It could have been done, though, couldn't it?

A. Maybe.

Q. Where were you standing when you tried to turn the hatch beam over?

A. At the end of the beam.

Q. And your partner at the other end, is that right?

A. That is right.

Q. I believe you testified in answer to Mr. Sibbett's questions you believed you had oil on your shoe. What led you to that belief, Mr. Harrison?

A. Because oil was all around most of the deck.

Q. Well, did you see any oil on your shoe? [32]

A. Well, it's impossible to walk around an oily floor and not get oil on your shoes when oil is mostly over the floor.

Q. Now, you were taking it easy, is that right,

(Testimony of Benjamin Harrison, Jr.)

when you were unloading this hold because you had been warned by Mr. Jensen?

A. I wouldn't say exactly taking it easy because I wanted to do the job, do my part of the work, go on to do a man's job.

Q. Well, were you conscious of the presence of oil down there? A. I were.

Q. Were you being careful? A. I were.

Q. Now, before you took hold of this hatch beam to turn it over, did you look on the deck around the place where you were standing to see if there was any oil there? A. I did.

Q. And was there any oil there?

A. Not where I was standing.

The Court: What had happened to the three strongbacks before that? What had you done before that?

A. Well, we landed that on the offshore side of the ship.

The Court: On the offshore side?

A. Yes, offshore.

The Court: How had they been landed?

A. Same identical way, but we were more of us on the other [33] side.

The Court: Did you turn them over, too?

A. We did.

The Court: On their side?

A. Yes.

Q. (By Mr. Thornton): Was the gaffer watching you when you turned these beams over?

A. No, he was on deck.

(Testimony of Benjamin Harrison, Jr.)

Q. Had you ever been told not to turn these hatch beams over by end? A. No, sir.

Q. Had you done it before?

A. Yes, I have.

Q. Now, during the time you were working down in the hold, from the time you first went in until you slipped, did you see any of the ship's officers or crew around?

A. Yes, I saw one of the mates look down in the hold.

Q. Did you say anything to the mate?

A. No. It's not my business to say anything to him.

Q. Did you hear him say anything?

A. No, I just saw him looking down.

Q. Now, when you were removing the jeeps from the upper 'tween deck, the shelter deck, did any oil drip out? A. Yes.

Q. What were the lighting conditions in the hold? How much [34] light did you have?

A. Well, there was plenty of light.

Q. So then, Mr. Harrison, it's your testimony that you think you had oil on your shoe and that caused you to slip, is that right? A. Exactly.

Q. Did you pay any of your doctor's bills?

A. No, I didn't.

Q. Do you know who paid them?

A. No, I don't know. I imagine the Stevedoring Company that I work for.

Mr. Thornton: I have no further questions.

(Testimony of Benjamin Harrison, Jr.)

Cross-Examination

By Mr. Schaldach:

Q. Mr. Harrison, you were off work from the date of the injury, which was the 14th of October, 1954. You went back to work on the 19th of November, isn't that correct?

A. Maybe so. I don't know exactly.

Q. And you were paid compensation for four weeks and one day, isn't that correct, sir?

A. Yes.

Q. A total amount of about \$145?

A. \$35 a week.

Q. \$145 total?

Mr. Schaldach: Counsel, is that correct? I have given [35] you these figures.

Mr. Sibbett: Yes. I think you should point out to the Court that no compensation was paid for the first week.

Mr. Schaldach: That's correct. No compensation was paid for the first week. Mr. Harrison received comp. for four weeks and one day, and therefore off for five weeks and one day; received medical benefits, doctors' and hospital, in the total amount of \$162.85.

The Court: How much?

Mr. Schaldach: \$162.85.

The Court: That is doctor and hospital?

Mr. Schaldach: Yes, your Honor.

Mr. Sibbett: Before you go on, Mr. Schaldach, may we also stipulate that if Mr. Harrison received

(Testimony of Benjamin Harrison, Jr.)

an award in this case there will be deducted from that award the sum of \$307.85 to be paid back to the carrier for the Stevedoring Company?

Mr. Schaldach: That's the total amount of the comp.

The Court: That is one hundred forty-five plus the one hundred sixty-two?

Mr. Schaldach: That is correct.

Mr. Sibbett: That has to be paid out if there is an award.

The Court: Very well. What is that total? Is it one hundred forty-five, even? [36]

Mr. Schaldach: Yes, your Honor, one hundred forty-five, even.

Q. Mr. Harrison, since returning to work after this accident on the 19th of November, you have earned just as much, haven't you, as you earned prior to the injury, on the average?

A. I figure about the average, yes.

Q. About the same? In other words, it shows here from the records—. Have you examined this, by the way, Mr. Harrison? Pacific Maritime Association letter showing the earnings which you have made prior to your injury and after your injury.

A. Yes.

Q. And does that correctly reflect the earnings that you have made?

A. Oh, yes, I am pretty sure that is right.

Q. You haven't lost any time, have you?

A. No, I wouldn't say, because the day that I take off for something to go to the doctor, I had

(Testimony of Benjamin Harrison, Jr.)

that leg ache at the time, but I wouldn't say exactly lost time.

Q. When was the last time—. By the way, you were treated by Dr. Lum, weren't you—Dr. Donald Lum over in——

A. Alameda.

Q. 2225 Central Avenue, Alameda?

A. That's right.

Q. And this laceration that you talked about, or this hole that you talked about, as a matter of fact it was a cut in the [37] back of your left knee, wasn't it, right where your knee bends?

A. That's right.

Q. Probably about two and one-half to three inches long, isn't that right?

A. That's right.

Q. And when you say you went in to surgery, what you mean is that the doctor put you in the hospital in Alameda and sewed that up, sutured it, isn't that right?

A. Sewed it up, that's right.

Q. That is all he did for you. And you went back and saw him on several occasions for treatment, right?

A. Yes, I went back for treatment.

Q. In other words, what did he do? Give you hot baths?

A. No, he just—well, I come out of the hospital, it taken a while before that hole completely filled in, because there was a hole in that leg after he taken the stitches out, and he put powder in there to fill that in—healing powder.

Mr. Schaldach: Your Honor, I am advised by Mr. Sibbett that he will not have a doctor here and the doctor whose report he intends to introduce was

(Testimony of Benjamin Harrison, Jr.)

not the attending physician. I have the first report of injury, and counsel for all parties have stipulated that it may be received in evidence.

The Court: All right, Impleaded Respondent's Exhibit A.

(Whereupon first report of injury referred to above was received in evidence and marked Impleaded [38] Respondent's Exhibit A.)

Q. (By Mr. Schaldach): Now, Mr. Harrison, you say that when you went to work that particular morning at Benicia you went down into the shelter deck? A. That is right.

Q. Where the jeeps were in the wing, is that correct? A. That's right.

Q. Now, did you notice this oil that was on the shelter deck on the hatch boards?

A. Wasn't much on the hatch boards.

Q. Where was the oil located?

A. Right on the steel deck, in the square.

Q. In the wings? A. Yes, all around.

Q. The wings are that portion of the deck, on the shelter deck, which are outside of the square of the hatch, is that correct?

A. That is right. All around the square.

The Court: But are underneath the main deck?

A. Yes.

Mr. Schaldach: Yes, your Honor. Each deck has a name to it. Some of them have different names, but usually they call it the upper 'tween, lower 'tween, and this they call the shelter deck.

Q. Is that commonly known as the upper 'tween

(Testimony of Benjamin Harrison, Jr.)

deck—the [39] shelter deck? A. Yes.

Q. All right. And the square of the hatch goes all the way down, and on the sides and fore and aft, they designate those as the wings, I presume. Is that correct, sir?

A. Well, you say fore and aft. Right or left, you have a wing on each wide, right or left.

Q. That is the area which is not included in the square of the hatch? It's outside of the square of the hatch, is it not?

A. In other words, that is what is called the wing.

Q. Now, is that where the jeeps were located, sir, in the wings?

A. The jeeps were all around.

Q. They were all around?

A. That's right.

Q. Where did you notice the oil, though, that is what I want to know?

A. Around—in fact, all around the ship. In other words, all around the square.

Q. Was it globs of oil, Mr. Harrison, or was it—did it look like a film of oil, or can you give us a better idea of what it looked like?

A. Well, in some places on the ship the deck runs a little lower than others. Well, the oil at the front, on the front of that square, well, as it goes back and there is a lot of oil [40] there, most of it will be sort of deeper farther back because it has a lift back that way on the deck, and there will be more on the back than there will be in the front.

(Testimony of Benjamin Harrison, Jr.)

Q. Well, was the oil runny in nature or was it solid?

A. Well, the oil was just like you would get there on the floor. Same thing.

Q. You saw it on the deck? A. Oh, yes.

Q. For example, these squares here, these dark squares of linoleum here, would the spots of oil be as large as those?

A. Well, the oil is solid, not just mostly in spots. It's solid, mostly all over the wings.

Q. In other words, am I correct in saying that there was rather a film or sheet of oil across the whole deck?

A. Yes. Very few dry spots you would find.

Q. Very few dry spots?

A. That's right. As far as the wings, yes.

Q. Was this dry oil or was it runny oil?

A. Well, no, it's wet oil.

Q. Wet oil? Runny oil? A. Yes.

Q. Then is that when you asked Mr. Jensen to get some sawdust?

A. No, when I first come down, before we uncovered the hatch.

Q. You saw the condition, is that right? [41]

A. Yes.

Q. In other words, you had a talk with, and I presume the men you were working with, had a talk with the gang boss?

A. Oh, yes, right away.

Q. You wouldn't work, would you, until you got that oil cleaned up there?

(Testimony of Benjamin Harrison, Jr.)

A. Not if it was possible.

Q. Did you have a talk among yourselves about not working after Mr. Jensen came back and said he couldn't find any sawdust or sand?

A. Well, after the walker said, "Well, take it easy," well, we decided to try and continue with the operation, continue working.

Q. Did you have any dunnage down there, by the way, Mr. Harrison? A. No, no dunnage.

Q. No dunnage? You couldn't lay any wood over this?

A. No, there wasn't any wood on the deck.

Q. How long have you been a longshoreman?

A. Since January 27, 1944.

Q. About eleven years. A. That is right.

Q. You have worked on a lot of vessels, have you? A. Oh, yes.

Q. Taking out machinery? [42] A. Yes.

Q. Automobiles?

A. Oh, yes. Loaded them and unloaded them. Used to work on a heavy lift gang all during the war time. All heavy equipment handled during the war.

Q. By the way, Jones Stevedoring doesn't have a terminal building up there at Benicia, does it? I mean there is no building up there in which Jones has its gear stored? You bring your gear with you, do you not? A. You bring the gear.

Q. That is, the Stevedoring Company brings the gear?

A. I imagine. I don't know exactly.

(Testimony of Benjamin Harrison, Jr.)

Q. Whereabouts in Benicia, Mr. Harrison, was this vessel docked?

A. The regular dock in there.

Q. Did you have to go through some reservation up there to get to the dock?

A. Oh, yes, you can't get to Benicia there without a guard checking you to see if you got your right identification.

Q. In other words, you have to go through a gate, is that correct? A. Yes.

Q. And they check you, and so forth?

A. That's right.

Q. Do you know what the custom is and practice, Mr. Harrison, [43] in the Port of San Francisco during your eleven years of doing longshore work with respect to the vessel providing sawdust or sand?

A. Well, I didn't know who supplied it.

Q. Well, let me ask you this: Have you been on vessels before where you have done work where oil and grease has been around the deck?

A. Yes.

Q. And asked the vessel's personnel or the vessel's mate or someone to buy sand or sawdust and the same was provided for by the vessel?

A. Well, we always ask the gaffer, and where it comes from we don't know, whether the ship supplies them or whether the walking boss supplies them.

Q. You mean Mr. Jensen——

A. (Interposing): That's right.

(Testimony of Benjamin Harrison, Jr.)

Q. You wouldn't know that?

A. That's right. He takes his orders from the walking boss, we take our orders from him.

Q. By the way, this strongback that fell over on you, when it landed it was about like this (indicating), on edge?

A. That is right.

Q. And then you got on one end and your co-worker got on the other end and you were attempting to lay it down on its side?

A. That's right. [44]

Q. And at that time as it was being laid down on its side you slipped and your left leg fell underneath it and it fell on you?

A. That is right.

Q. In other words, it didn't drop on you?

A. No.

Q. Just tilted?

A. That is right.

Mr. Schaldach: No further questions.

Redirect Examination

By Mr. Sibbett:

Q. Mr. Harrison, on this particular morning and before you were hurt, had you had any difficulty with your footing at all?

A. No.

Q. Had you slipped at any time, although you hadn't hurt yourself?

A. Well, no, I hadn't hurt myself.

Q. Had you slipped a little bit?

A. Well, it was pretty slippery on deck, around the deck. That is what made us notice right away,

(Testimony of Benjamin Harrison, Jr.)

the minute we came down, that the coaming was pretty slippery. Taking those strongbacks out or anything, walking around, even when we went to cut the wires and all, to cut the jeeps loose, that is why we applied for sawdust or something right away.

Q. During that hour or so that you did work there before you [45] were hurt, had either one of your feet started to slip before that time?

A. Well, no, I wouldn't say they started to slip.

Q. Well, how was the footing?

A. By the deck having oil on it, when you walked, well, you may slide a little on the grease, but not enough to amount to nothing, probably because it would be just enough to notice right away that you should have something on the deck because it was unsafe. Anyone was apt to get hurt.

Q. Now, as you and your partner were tilting the beam over to lay it down on its side, what would have happened if you had let go to change your position in any respect?

A. I was standing at the edge of the beam, and I thought I had a pretty good holt to avoid slipping or anything, and I didn't think I would slip under the beam or anything because I was standing clear of the beam.

Q. Did you slip?

A. And when the beam started, well, I started slipping with the beam. As the beam started over, I started sliding under that beam, and the beam

(Testimony of Benjamin Harrison, Jr.)

started scratching my kneecap, a little above my kneecap, all the way down until I hit the deck.

Q. What caused you to slide?

A. Well, grease on the bottom of my shoes.

Mr. Sibbett: That is all. [46]

Recross-Examination

By Mr. Thornton:

Q. What kind of shoes were you wearing, Mr. Harrison? A. Well, regular work shoes.

Q. High, muleskin shoes?

A. Regular work shoes with rubber heels and bottom.

Q. In response to one of Mr. Sibbett's questions just now you said they should have had something on the deck because it was unsafe. Do you remember saying that? A. That is right.

Q. You knew it was unsafe, didn't you?

A. Yes, we all knew it was unsafe.

Q. And you continued to work?

A. Well, after the walking boss said to try to take it easy and they didn't apply sawdust or anything, they didn't have any, we didn't want to hold the ship up.

Mr. Thornton: That is all.

(Testimony of Benjamin Harrison, Jr.)

Redirect Examination

By Mr. Sibbett:

Q. Mr. Harrison, on that subject, did the fact that you were handling military cargo and were on a ship that was in command of military officers have anything to do with your decision to try to do your job?

A. That's right. That is why we didn't want to hold the ship up.

The Court: All right, that is all. You may step down. [47]

(Witness excused.)

Mr. Sibbett: Does your Honor wish to continue?

The Court: Yes.

Mr. Sibbett: Mr. Jensen.

CHRISTIAN JENSEN

called as a witness on behalf of the libelant; sworn.

The Court: State your full name, please.

A. Christian Jensen.

The Court: Sit back and speak out.

A. Christian Jensen.

Direct Examination

By Mr. Sibbett:

Q. What is your present occupation, Mr. Jensen?

A. I am a longshore foreman.

Q. Longshore foreman? And you are sometimes called a gaffer and sometimes a gang boss, is that

(Testimony of Christian Jensen.)

correct? A. That's right, sir.

Q. And how long have you worked as a longshoreman?

A. Well, in San Francisco I been working off and on since 1922.

Q. Since 1922? A. That's right, sir.

Q. And how long have you worked steadily as a longshoreman? A. Since 1934. [48]

Q. How long have you been a gang foreman?

A. Well, from 1945. In 1945 I was walking foreman for about three or four years, and then I laid off and went in again. I didn't want to be foreman.

Q. You didn't want to be foreman for a while?

A. No. So I was hurt in 1950 and I have been foreman since.

Q. I see. Because of that injury you weren't able to do regular longshoreman's work and you went back to being a boss, is that right?

A. That's right.

Q. Now, you have heard Mr. Harrison testify here this morning, have you not? A. Yes.

Q. And Mr. Harrison, as I understand it, was a member of your gang on that particular morning up at Benicia, is that right?

A. That's right, sir.

Q. Now, as I understand it, you don't have what is known as a regular gang? In other words, the men you boss come off the plug? They are different men? A. Yes.

(Testimony of Christian Jensen.)

Q. So did you know Mr. Harrison personally before this time?

A. Oh, I seen him off and on, but I didn't know him.

Q. Just occasionally, once in a while you would catch him as a member of your gang, is that right?

A. That's right. [49]

Q. Now, what time did you board the vessel, you and your gang, to go to work that morning?

A. Eight o'clock in the morning.

Q. And Mr. Harrison's recollection is that you went to the No. 1 hatch, is that right?

A. Well, it was a Navy ship and some of those has two hatches. One is a blind hatch so I am not sure, but we had No. 1 gear.

Q. You had No. 1 gear?

A. Yes. Now, I am not positive, I am not sure as to No. 1 or No. 2 hatch, but we had No. 1 gear.

Q. In other words, you were using the No. 1 mast and booms for discharging cargo?

A. That's right.

Q. When you went aboard was the hatch open or closed at the main deck level?

A. The hatch was open. The sailors must have took it off and had the gear ready for us to start in the morning.

Q. Is this the first time you had worked aboard that vessel?

A. Yes. We only worked one day there.

Q. I see. And that was this particular day?

A. That's right.

(Testimony of Christian Jensen.)

Q. So that when you went aboard the vessel the men were able to go directly down to the shelter deck without taking any hatch covers or booms off the main deck? [50]

A. That's right.

Q. And when the men went down, did you have occasion to go down below?

A. I always, yes, as foreman I always make myself duty to go down and inspect the gears first. Most of the time I go down and look it over, and I went down and I saw all that——

Q. (Interposing): Just a minute, Mr. Jensen. We will just take this slowly and one thing at a time.

On this particular morning did you go down to the shelter deck and look around?

A. Yes, that's right.

Q. And did you see anything unusual about the conditions there on this morning?

A. Sure.

Q. What did you see?

A. Well, I saw the whole 'tween deck right from the edge of the hatch coaming, from the forward end to the after bulkhead was full of oil. And the after end, of course, you have a little sheer, and the after end was up to half an inch of oil.

Q. Now, you say "a little sheer." You mean it slants down?

A. Yes, that's right.

Q. How was it out around the hatch opening itself?

A. There was sign of oil all over, except at the top hatches. In the wooden hatches there was none because there was no jeeps there. [51]

(Testimony of Christian Jensen.)

Q. In other words, the hatch boards had no oil on them because there were no jeeps there?

A. No. That's right.

The Court: There were no what?

Mr. Sibbett: There were no jeeps there on the hatch boards.

Q. Now, what if anything did you do about this condition that you observed?

A. Well, first thing I come down, I went and saw the walking boss.

Q. Now, do you remember his name?

A. Well, yes, but I can't pronounce it. I give you the name. I——

Q. Did he have a nickname?

A. No. Eckstein, something like that.

Q. "Eckstein, something like that"?

A. Yes. I forget his name.

Q. Now, he is the man that you reported to——

A. That's right.

Q. ——if you had any requests to make, or complaints, or asking for instructions or anything like that?

A. That's right.

Q. Where did you see him?

A. I saw him up on the main deck.

Q. By the hatch or away from that? [52]

A. Well, he come up to the hatch and I was talking to him.

Q. Now, was there anybody else there when you talked to him?

A. Yes, there was the receiving officer, or who-

(Testimony of Christian Jensen.)

ever he was. I don't know. I wasn't introduced to him.

Q. Was he in uniform? A. That's right.

Q. And he was an officer, is that right?

A. That's right.

Q. You don't know his rank?

A. I don't know what rank he have?

Q. What if any conversation was had between the three of you, the walker, the officer and yourself?

A. I only had conversation with the walking boss.

Q. Was the officer there within hearing of this conversation? A. That's right.

Q. He was right there? A. That's right.

Q. What did you say to the walking boss in substance?

A. I asked if we couldn't get some sawdust, sand or any other substance there that you could cut the grease because we needed that or stop working.

Q. Either that or you would stop working?

A. That's right.

Q. And what did the walk say to you?

A. He said there was no such a thing available. So I went [53] down and talked to the men, after I asked for that substance to put on the grease, then I went down and talked to them.

Q. And what did you tell the men?

A. I asked them, "Do you want to work or do you want to lay off work, either to be careful or to go home? You have to do something because that is not safe."

(Testimony of Christian Jensen.)

Q. What did the men decide to do?

A. Well, decided they were going to stop.

Q. I didn't get that.

A. They decided they going to stop working.

Q. Oh, I see.

A. But then the commanding officer and the walking boss come out that the ship had to go somewhere else to load, and so on, in a hurry, and why we couldn't work carefully so the ship could get out that day and go down to another port to load the following day.

Q. Now, where did this conversation take place where the officer—Who was it that talked about the ship wanting to get unloaded and get to another port? A. That's the walking boss.

Q. Was the commanding officer with him at that time? A. He was standing next to him.

Q. I see. And did you tell the men—go down and tell the men what they said?

A. I went down and talked to them and asked them what their [54] decision would be.

Q. And what was the decision?

A. The decision was that, "We will continue."

Q. Continue to work? A. Yes.

Q. Now, as I understand it, Mr. Jensen, you didn't actually see and you weren't present and didn't see the accident Mr. Harrison had, did you?

A. No, but I have a good idea how it happened.

Q. Well, that's all right, but you didn't see it?

A. No, I didn't.

Q. When did you first know something had hap-

(Testimony of Christian Jensen.)

pened to Mr. Harrison? A. Right away.

Q. How did you know?

A. Because I was standing right up on the deck and everybody looking down in the hatch.

Q. I see. And did you immediately go down there to where Mr. Harison was lying?

A. No, I did not.

Q. What did you do?

A. I called for a stretcher and I hollered for an ambulance.

Q. I see. Then did you go down below?

A. That's right.

Q. As soon as you called for the stretcher and ambulance, [55] then did you go down below?

A. Yes, I went down and I helped put him in the stretcher.

Q. And when you went down below, where was Mr. Harrison lying with relation to the strongback?

A. Well, he was clear of the strongback at that time.

Q. The strongback had been taken off his leg?

A. That is right.

Q. Was he still lying on the deck? A. Yes.

Q. Did he appear to you to be in any pain? Was he making any complaints of pain?

A. Well, the poor devil, he was almost out.

Q. He was almost out, was he?

A. That's right.

Q. Now, what was the condition of the deck around where Mr. Harrison was lying?

A. Well, it was pretty slippery.

(Testimony of Christian Jensen.)

Q. Was there grease or oil there?

A. It was pretty greasy, yes.

Q. They took Mr. Harrison away. Did the men continue working under those conditions?

A. No, we stopped.

Q. You stopped work? A. That's right.

Q. And did they do something about that [56] grease?

A. Yes, about 15 or 20 minutes after, here come a truck up with all kinds of——

Q. (Interposing): Just a minute. I don't follow you. A. Pardon me.

Q. Here comes what?

A. Here comes a truck up——

Q. A truck up?

A. Yes. With sand. No, not sand. With sawdust and some chemical stuff to cut the oil.

Q. And did they take that sawdust aboard and that chemical and put it down on the deck?

A. That's right.

Q. Who did that work?

A. Well, I helped them out down there, and we all helped each other.

Q. Did any of the members of the crew help or just the longshoremen?

A. Just the longshoremen.

Q. Of course, by that time you had gone down to the deck below, is that right?

A. We had everything secured and safe we could before we went down below, and after that we went down below.

(Testimony of Christian Jensen.)

Q. Were there jeeps in the deck below?

A. Yes.

Q. Same kind of cargo as up on the shelter [57]
deck? A. Yes.

Mr. Sibbett: That is all.

Cross-Examination

By Mr. Thornton:

Q. Mr. Jensen, your walking boss was an employee of Jones Stevedoring Company, isn't he?

A. That is right, sir.

Q. Now, you said you saw a receiving officer talking to the walking boss, is that right?

A. Well, I don't know if he was receiving officer. He must have been because he were taking good care of the cargo, so he must have been the receiving officer.

Q. But you don't know what his rank was?

A. No, I did not.

Q. And you are assuming he was the receiving officer? A. That's right.

Q. He might have been an Army doctor?

A. No, he couldn't have been.

Q. Would you have known the difference?

A. Well, I guess I would.

Q. Now, you put it up to the men whether they wanted to continue to work or lay off, isn't that right? A. That is right, sir.

Q. And who made the decision to continue on with the work?

(Testimony of Christian Jensen.)

A. Well, I guess it is a—we were talking. We all figured because the ship was in such a hurry to be unloaded that we [58] decided we going to work.

Q. Now, when your walking boss was talking to this receiving officer, so-called, did you hear him ask this receiving officer for some sand or sawdust?

A. Yes, I did.

Q. Did you hear the walking boss ask him?

A. Well, yes, I did. During the discussion he said there was nothing available. They was talking, “What you going to do?” and that’s it.

Q. But you don’t know exactly who he was?

A. No, I did not.

Q. Now, you mentioned a commanding officer. How do you know he was the commanding officer?

A. Well, there was about five or six people down there altogether, but I don’t know who they was. He was in civilian clothes.

Q. I see. And now you said that about 10 or 15 minutes after Mr. Harrison was hurt a truck came up with some sawdust and chemicals?

A. That’s right, sir.

Q. Then it is true, isn’t it, Mr. Jensen, that there was sawdust available?

A. That’s right, there must have been.

Mr. Thornton: That is all. [59]

(Testimony of Christian Jensen.)

Cross-Examination

By Mr. Schaldach:

Q. Mr. Jensen, you say about 15 minutes after Mr. Harrison was hurt you saw a truck come up with sawdust? A. That's right.

Q. Where did you see that truck come from?

A. That come up from the yard, I believe. When you are on a ship you don't see very far. It has a hole coming out like this (indicating), behind the buildings. You can't see where the truck comes from.

Q. In other words, your view is obscured by some buildings there, is that right?

A. That's right, sir.

Q. In other words, if you were on the deck you can't see what happens behind this building?

A. That's right.

Q. But the truck did come from behind the building and come out in the open and that is when you saw it? A. That's right.

Q. What kind of a truck was it?

A. That was a pickup truck.

Q. What color was it painted?

A. I believe a blue.

Q. Do you know whose truck it was? Do you know who it belonged to? [60]

A. No. I guess it belonged to Jones Company. I am not sure, though.

Q. You don't know? A. No.

Q. Was it an Army truck?

(Testimony of Christian Jensen.)

A. No, not an Army truck. But I didn't see no name on it.

Q. There was no name on it?

A. I don't believe so. I didn't see no name.

Q. Do Jones Stevedoring trucks have the names on it?

A. Most stevedoring companies have their name painted on it.

Q. Well, Jones Stevedoring equipment is painted sort of an, oh, kind of a yellow, isn't it?

A. Yes.

Q. Or kind of an orange color?

A. Kind of a buff.

Q. Buff, yes. Was it that color—the truck?

A. No, it was blue.

Q. Blue? Did that truck bring the sawdust on to the vessel? A. Right down to the dock.

Q. No, my question was, did the sawdust eventually get on the vessel? A. Yes, sir.

Q. Who brought it aboard? A. We did.

Q. You did? Did you use that there in No. 2 hold or No. 1 [61] hold? A. Yes.

Q. After Mr. Harrison was hurt?

A. Yes, sir.

Q. Do you know how the sawdust happened to get to the vessel? A. From the truck, or what?

Q. I mean, you don't know——

A. (Interposing): I don't know anything about that.

Q. You didn't hear any conversation between

(Testimony of Christian Jensen.)

the walking boss and the Army man about the saw-dust coming?

A. No, I don't know who did that.

Q. You don't know anything about that?

A. That's right.

Mr. Schaldach: I see. That is all.

Redirect Examination

By Mr. Sibbett:

Q. Well, Mr. Jensen, Mr. Schaldach who just talked to you about this officer that was with the walking boss when you talked to the two men, what generally was this officer doing that morning around the ship?

A. I guess he was responsible for the cargo, that they were discharging without too much damage.

Q. What did he do to make you think that that was what his job was?

A. Because he was interrupting me and the gang quite a bit. [62] You see, one jeep will stand here at a 45 degree angle, and only the first tier of cars was standing on the level and all the others was standing up.

Q. What did this officer do?

A. Just a moment. If they stick together like this, we have to hook on with wires and heave them out, and naturally you are all facing together, and of course those old cars, they was all damaged as they was, and you stand there and holler, "Don't damage them any more than they are. Don't damage them, don't damage them."

(Testimony of Christian Jensen.)

Q. That was this officer?

A. Yes. And I said, "Either we leave them alone or you keep your mouth shut," I said, "because we don't want to be bothered." I said, "I am running this job and if we are not capable to do it," I said, "you may as well discharge us, get somebody else to do it."

Mr. Sibbett: Thank you.

Mr. Thornton: Mr. Jensen, is this the receiving officer you are talking about now? A. Yes, sir.

Mr. Thornton: That is all.

The Court: That is all. You may step down.

(Witness excused.)

Mr. Sibbett: Judge, the only other matter I have is our medical. We had Mr. Harrison examined on May 9th by Dr. [63] Gerald G. Gill. I believe counsel will stipulate Dr. Gill is qualified as an orthopedic specialist.

Mr. Thornton: Yes.

Mr. Sibbett: And to obviate unnecessary expense it has been stipulated that we may read Dr. Gill's report into evidence and opposing counsel may do likewise with their medical report.

I will ask that Dr. Gill's report be admitted into evidence as, I think, our third exhibit.

The Court: Libelant's Exhibit 3.

(Whereupon, medical report referred to above was received in evidence and marked Libelant's Exhibit No. 3.)

The Court: It is in evidence now. Let me read it.

Mr. Sibbett: Yes. Libelant rests, Judge.

Mr. Thornton: Your Honor, at this time, at the commencement of Respondent's case, I believe it would be appropriate to submit the report of our medical officer. I believe Mr. Sibbett will stipulate that if he were present he would testify as in this report.

Mr. Sibbett: Yes.

Mr. Thornton: May we offer it as Respondent's Exhibit 1?

(Whereupon, medical report referred to again was received in evidence and marked Respondent's Exhibit A.) [64]

Mr. Thornton: Respondent offers a copy of a contract between Jones Stevedoring Company and the United States Federal Government as of 1 January, 1954, and running until 31 December, 1954.

Mr. Sibbett: May the record show that in not objecting to the offer just made, the libelant, of course, contends that any contractual arrangement between the Government and the Stevedoring Company has nothing whatsoever to do with his claim against the United States.

The Court: It may be admitted and marked United States Exhibit B.

(Whereupon, contract referred to above was received in evidence and marked Respondent's Exhibit B.)

RESPONDENT'S EXHIBIT B

SF Coml.

1 January, 1954.

Contract for Stevedoring Services

Clause I

Stevedoring—General Scope of the Contract

a. General. The Contractor shall load and discharge cargoes and in connection therewith shall perform all the duties of a stevedore on any vessel which the Contracting Officer may designate at

Terminals in San Francisco Bay Area not under exclusive SFPE control (excluding Alameda Cold Storage Plant, Alameda)

upon the terms and conditions hereinafter set forth for the term of this contract, beginning 1 January, 1954, and ending 31 December, 1954; provided, however, that any work started before and not completed by the expiration of this contract shall be governed by the terms of this contract unless otherwise directed by the Contracting Officer.

b. Contractor's Duties (1) Loading. In loading vessel, the Contractor shall remove and handle cargo from place of rest on pier or in pier shed or within the cargo assembly area (as defined in Clause 1b (4)); also, from open-top railroad cars, trucks and trailers alongside ship; also from barges, lighters, scows, car floats and open-top railroad cars on car floats alongside ship. The Contractor shall stow said cargo in any space in the vessel, including bunker space, holds, 'tween decks, on deck and deep

(Respondent's Exhibit B—Continued.)

tanks, in the order directed by and in a manner satisfactory to the Contracting Officer and the master of the vessel or his representative.

(2) Discharging. In discharging vessel, the Contractor shall remove and handle cargo from any space in the vessel, including bunker space, holds, 'tween decks, on deck, and deep tanks. The Contractor shall land said cargo at place of rest on pier or in pier shed or within the cargo assembly area (as defined in Clause 1b (4)); also on open-top railroad cars, trucks and trailers alongside ship; also on barges, lighters, scows, car floats and open-top railroad cars on car floats alongside ship. The Contractor shall perform such discharging in the order directed by and in a manner satisfactory to the Contracting Officer.

* * *

c. Damage Reports. In all instances where cargo, vessel, vessel equipment or Government equipment sustains damage through handling by the Contractor's employees, a full report of the fact and the extent of such damage shall be submitted by the Contractor to the Contracting Officer within twenty-four (24) hours following the occurrence of such damage.

(1) Safety and Fire Regulations. The Contractor shall, in performing services under this contract, comply with safety and fire regulations promulgated by the San Francisco Port of Embarkation and shall observe all commercial marine safety practices. In all instances where Contractor's employees

(Respondent's Exhibit B—Continued.)

are injured, a full report of the fact and the extent of such injury shall be submitted by the Contractor to the Contracting Officer, or to the agency designated by him, within twenty-four (24) hours following the occurrence of such injury, and in the form prescribed by the Contracting Officer. If an Army investigation of the accident is conducted, the Contractor shall assist the investigator in securing statements from his employees and shall make pertinent records available to him.

d. Rigging and Unrigging. When the ship's gear is used for handling cargo, the Contractor, at his own expense, shall rig and unrig all gear, including the rigging and unrigging of heavy-lift gear when the heavy-lift booms are used, and shall hoist, lower and secure hatch tents when necessary; provided, however, that where any one set of gear is rigged for handling less than 100 payable tons of cargo on a commodity rate basis, the Contractor shall be compensated on an extra-labor basis for the rigging and unrigging of such set of gear. Rigging and unrigging shall include topping, lowering, and trimming of booms. When the Contractor is required to perform any rigging or unrigging services for the purpose of performing extra labor services, or performs any such services at the request of the Contracting Officer for any purpose other than loading or discharging cargo on a commodity rate basis, he shall be compensated therefor at extra labor rates. When the Contractor is required to break out booms

(Respondent's Exhibit B—Continued.)

from collars or boom rest, or to reeve guys on topping lifts through blocks, he shall be compensated therefor on an extra-labor basis.

(1) Where the Contractor has rigged or unrigged gear for the loading or discharging of cargo on a commodity rate basis, the fact that such gear is also used to perform extra-labor services, or other services at the request of the Contracting Officer, shall not entitle the Contractor to extra labor rates for the rigging, or unrigging.

e. Opening and Closing Vessel. The Contractor shall, at his own expense, remove and replace tarpaulins, battens, hatch covers and beams with respect to all decks and deep tanks both during loading and unloading operations and when necessary because of weather or working conditions, as directed by the Contracting Officer; provided, however, that the opening and closing on any one hatch shall be performed on an extra-labor basis where less than one hundred (100) payable tons are to be loaded and/or discharged at the commodity rate on any hatch so worked, and also where the Contractor is required to open and close the vessel for the purpose of performing extra-labor services. The removing, handling, replacing or setting of reefer plugs during the handling of cargo in any or all refrigerated or chilled space aboard the vessel is included in the basic commodity rate, except where the complete operation is on an extra-labor basis. When the

(Respondent's Exhibit B—Continued.)

Contractor is required to open or close reefer plugs more than once in any four-hour shift because of a change in orders or type of cargo, he shall be compensated therefor on the basis of 15 minutes detention time for men in gangs, including equipment drivers and gang foremen.

(1) Where the Contractor has opened or closed any hatch for the loading or discharging of cargo on a commodity rate basis the fact that such hatch is also used for the loading or discharging of cargo on an extra labor basis shall not entitle the Contractor to extra labor rates for the opening or closing of such hatch.

* * *

Clause 12. Liability and Insurance

a. The contractor

(1) shall be liable to the Government for any and all loss of or damage to cargo, vessels, piers or any other property of every kind and description, and

(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents or employees in the performance of work under this contract. The general liability and responsibility of the Contractor

(Respondent's Exhibit B—Continued.)

under this clause are subject only to the following specific limitations:

b. The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons:

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury or death.

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the Contracting Officer.

c. The Contractor shall at its own expense procure and maintain during the term of this contract, insurance as follows:

(1) Standard Workmen's Compensation and Employer's Liability Insurance and Longshoremen's and Harbor Workers' Compensation Insurance, or such of these as may be proper under ap-

(Respondent's Exhibit B—Continued.)

plicable state or Federal statutes. The Contractor may, however, be self-insurer against the risk in this sub-paragraph (1), if it has obtained the prior approval of the Contracting Officer. This approval will be given upon receipt of satisfactory evidence that the Contractor has qualified as such self-insurer under applicable provisions of law.

(2) Bodily Injury Liability Insurance in an amount of not less than \$50,000 any one person and \$250,000 any one accident or occurrence.

(3) Property Damage Liability Insurance (which shall include any and all property, whether or not in the care, custody or control of the Contractor) in an amount of not less than \$250,000 on account of any one accident.

d. All policies of insurance required under the terms of this contract shall by appropriate endorsement, or otherwise, provide that no cancellation thereof shall be effected unless thirty (30) days' prior written notice thereof has been given to the Contracting Officer.

e. Satisfactory evidence of the required insurance endorsed as above shall be filed with the Contracting Officer prior to the performance of any work under this contract.

f. The Contractor shall, at its own cost and expense, defend any suits, demands, claims or actions, in which the United States might be named as co-defendant of the Contractor, arising out of or as a

(Respondent's Exhibit B—Continued.)

result of the Contractor's performance of work under this contract, whether or not such suit, demand, claim or action arose out of or was the result of the Contractor's negligence. This shall not prejudice the right of the Government to appear in such suit, participate in defense, and take such action as may be necessary to protect the interests of the United States.

g. It is expressly agreed that the provisions contained in Sections c. through f. of this Clause shall not in any manner limit the liability or extent of liability of the Contractor as provided in Sections a. and b. of this clause.

h. In the event that the Contractor is indemnified, reimbursed or relieved for any loss or damage to Government property, it shall equitably reimburse the Government. The Contractor shall do nothing to prevent the Government's right to recover against third parties for any such loss or damage and, upon the request of the Contracting Officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

* * *

[Endorsed]: Filed August 11, 1955.

Mr. Thornton: Respondent calls Rollin Greening.

ROLLIN E. GREENING

called as a witness on behalf of the respondent;
sworn.

The Court: State your name, please?

A. Rollin E. Greening.

The Court: How do you spell your first name?

A. R-o-l-l-i-n.

The Court: And your last name?

A. G-r-e-e-n-i-n-g. [65]

Direct Examination

By Mr. Thornton:

Q. What is your address, Mr. Greening?

A. 363 Foster Road, Napa, California.

Q. What is your present occupation?

A. Traffic manager for the A. L. Chipman Van and Storage Company of that city.

Q. And what was your occupation on the 14th of October, 1954, Mr. Greening?

A. I was the Post Transportation Officer at Benicia Arsenal.

Q. I call your attention to that day and ask you if you recall an injury which occurred to the libelant here, Mr. Harrison. A. Yes, sir.

Q. Will you state for the Court when Mr. Harrison's injury first came to your attention and under what circumstances?

A. I had been down to the pier, the dock, at the

(Testimony of Rollin E. Greening.)

beginning of the operation, at which time the skipper had asked me to go up to our mailroom and get the ship's mail, which had come in prior to the arrival of the ship.

Upon my return to the dock I was immediately told that there had been an accident on board the ship. I made the inquiries I could and found that the man had been taken to the dispensary. I followed up there and found he had been given first aid, after which I returned to the ship.

Q. What occurred on your return to the [66] ship?

A. I found that the operation had been stopped, and I was immediately requested to secure something to put on the decks of the ship because of the oily condition.

Q. Do you know who requested that of you?

A. I don't remember his name. It was one of the supervisors from the Oakland Army Base. They kept direct supervision of the operation itself.

Q. In compliance with that request, did you obtain some substance to cover the oil?

A. Yes, sir.

Q. What did you obtain?

A. Obtained sand from our sandblasting section of the ordnance shops.

Q. Was that the first request you had received for sand or sawdust? A. Yes, sir.

Q. How far was it from where the ship was docked to the place where the sand was obtained?

A. Approximately 300 yards.

(Testimony of Rollin E. Greening.)

Q. And upon obtaining the same, the operation was resumed, I suppose, is that correct?

A. Yes, sir.

Mr. Thornton: No further questions.

The Court: Any questions?

Mr. Sibbett: Yes, a couple. [67]

Cross-Examination

By Mr. Sibbett:

Q. You, of course, were an officer in the United States Army at the time? A. Yes, sir.

Q. Were you the top representative of the Army aboard that vessel on that morning or was there anybody above you?

A. As far as receiving cargo, I wasn't actively in charge as the operation itself was under the direct control of the Oakland Army Base and their representatives. I merely acted as liaison between the ordnance on my base and the Oakland Army Base to receive and to move out from under the hooks any and all cargo that was put on our dock.

Q. You don't recall whether there were any Oakland Army Base officers aboard the ship, do you?

A. I believe there was.

Q. Do you recall a conversation between the gang foreman, this Mr. Jensen here, and the walking boss of the ship and you? A. No, sir.

Q. In which the subject of sand or sawdust was mentioned?

A. No, sir, not prior to the accident.

(Testimony of Rollin E. Greening.)

Q. Do you know of any conversation that was had on this subject with any other officer aboard ship? A. No, sir.

Q. It could have happened, but there wasn't any so far as [68] you were concerned?

A. That is right.

Mr. Sibbett: That is all.

The Court: Any questions, Mr. Schaldach?

Mr. Schaldach: No, your Honor, no questions.

The Court: All right, that is all.

(Witness excused.)

Mr. Thornton: The respondent has no further witnesses. The respondent has no more exhibits to offer.

Mr. Schaldach may or may not object to a photo-static copy of a certificate of insurance issued by the Firemen's Fund to Jones Stevedoring Company.

Mr. Schaldach: Let me see it.

(Document handed to Mr. Schaldach.)

Mr. Schaldach: I will object to the introduction of this document which Mr. Thornton has on the ground it is incompetent, irrelevant and immaterial.

The Court: What is the purpose of it?

Mr. Thornton: Your Honor, the purpose of it is that this is a certificate of insurance which states that anything in the policy notwithstanding, "It is understood and agreed that the company waives all right of subrogation against the United States of

America which it might have by reason of payments under this policy.”

In other words, if the Court finds the United States is [69] liable, our interpretation is that it will not be necessary for the libelant to reimburse the compensation carrier for the amount he has received in compensation and medical.

Mr. Schaldach: I don't understand what you mean.

Mr. Thornton: Well, Mr. Schaldach, in the event of a judgment against the United States in this case, I understood you to say that the compensation carrier expects the libelant to repay the compensation already received and the medical.

Mr. Schaldach: I believe Mr. Sibbett stated something about that.

Mr. Sibbett: Well, this is a very complicated situation, Judge, insofar as this compensation and medical is concerned. Of course, there is no formal claim or lien on file. We usually have a gentlemen's understanding with the stevedoring company that they don't have to go to the trouble of filing a lien, if they will cooperate with us we will protect them on the lien.

The Court: It is apparently Mr. Thornton's contention that in the event of a recovery by the libelant there will not be taken from him this three or four hundred dollars according to this contract of insurance.

Mr. Schaldach: I don't have any objection to that, your Honor. What bothers me in this case is

this: There is a contract here in evidence which your Honor hasn't read.

The Court: I have read it in other cases. Isn't it the [70] same contract?

Mr. Schaldach: It is usually the same one, yes, your Honor. In the event of a holdover, if the Court does find against the Government and finds against us, against the Stevedoring Company, we have a right to a set-off of that amount. Certainly, that is my only objection to it.

The Court: I haven't seen this contract, but I have seen contracts in similar cases. Isn't it generally the holding on that contract that if the employee of the Stevedoring Company who is injured, or any other employee of the Stevedoring Company, is in any way partially responsible for the happening of the accident, that the Stevedoring Company pays the entire judgment?

Mr. Schaldach: Subject to certain limitations, yes, that is generally it. The language is "in whole or in part," but there are various clauses there which have to be read in their entirety.

The Court: I know. And the only way your company is not liable under the contract is if this Court would hold that the United States was solely responsible for the accident?

Mr. Schaldach: Right. Or that the stevedore was solely responsible, in which event there would be no recovery against anyone.

The Court: If there is a recovery and the United States is held solely responsible, then you will be eliminated? [71]

Mr. Schaldach: That's true.

The Court: But if the responsibility is partly on the United States and partly the libelant, then under your contract you are required to pay it all?

Mr. Schaldach: It's not that simple, your Honor. There are other clauses in there which have to do with unseaworthiness which was not caused by the contractor.

The Court: I think I understand.

Mr. Sibbett: Our position on the compensation and medical expense is this, Judge: If your Honor is disposed to award damages to the libelant in this case, your Honor should decide whether or not the libelant does have to repay this money. If he does not, then you compute his award on a certain basis. If he does have to pay it back, there should be added to whatever your Honor feels he is entitled to an additional sum of \$300 or whatever it is.

The Court: I haven't seen the exhibit yet.

Mr. Schaldach: I will stipulate to this, your Honor—if it is agreeable to you gentlemen: In the event that there is a judgment against the Government and no right over against the Stevedoring Company, I will stipulate that I want no return of any compensation or medical!

The Court: Is that stipulated?

Mr. Sibbett: All right.

Mr. Schaldach: And if there is a judgment against the [72] Government and the Court finds over against Jones Stevedoring Company, we are entitled, under the cases, to credit.

The Court: All right. Well, we will admit this document and mark it United States Exhibit C.

(Whereupon, contract of insurance was received in evidence and marked Respondent's Exhibit C.)

The Court: But that is the stipulation between the parties as stated by Mr. Schaldach?

Mr. Sibbett: Yes, that is satisfactory.

Mr. Thornton: Your Honor, before resting I should like to submit the respondent's memorandum of points and authorities. And at that point the Government rests.

Mr. Schaldach: We have no witnesses. We rest, your Honor, also.

The Court: Do you want to argue the matter, Mr. Sibbett?

Mr. Sibbett: Yes, Judge, just very briefly.

(Thereupon, closing arguments were presented by respective counsel.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 73 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed January 18th, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Libel.

Amendment to Libel.

Respondent's Answer.

Petition to bring in Third Party.

Answer to Petition.

Order.

Findings of Facts and Conclusion of Law.

Decree.

Notice of Appeal.

Respondent's Designation to Record on Appeal.

Statements on Points upon which Appellant intends to rely.

Additional designation of impleaded respondent.

Reporter's transcript.

In witness whereof, I have hereunto set my hand and affixed the seal of this Court, this 5th day of March, 1956.

[Seal]

C. W. CALBREATH,

Clerk;

By /s/ WM. J. FLYNN,

Deputy Clerk.

[Endorsed]: No. 15054. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Benjamin Harrison and Jones Stevedoring Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 5th, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15054

THE UNITED STATES OF AMERICA,
Appellant,

vs.

BENJAMIN HARRISON and JONES STEVE-
DORING COMPANY,
Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY AND DES-
IGNATION OF THE RECORD WHICH IS
MATERIAL

Appellant hereby adopts as points on which it intends to rely on appeal, the Statement of Points Upon Which Appellant Intends To Rely filed in the court below on March 1, 1956, appearing in the typewritten transcript of record.

Appellant hereby adopts as its designation of all the record which is material to the consideration of its appeal, the Designation of Portions of the Record, Proceedings and Evidence To Be Contained in the Record on Appeal filed in the court below on March 1, 1956, appearing in the typewritten transcript of record.

LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney Gen.

Affidavit of mail attached.

[Endorsed]: Filed March 8th, 1956.

No. 15054

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

BENJAMIN HARRISON AND JONES STEVEDORING COM-
PANY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

BRIEF FOR APPELLANT

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FILED

JUN -7 1956

PAUL P. O'BRIEN, CLERK



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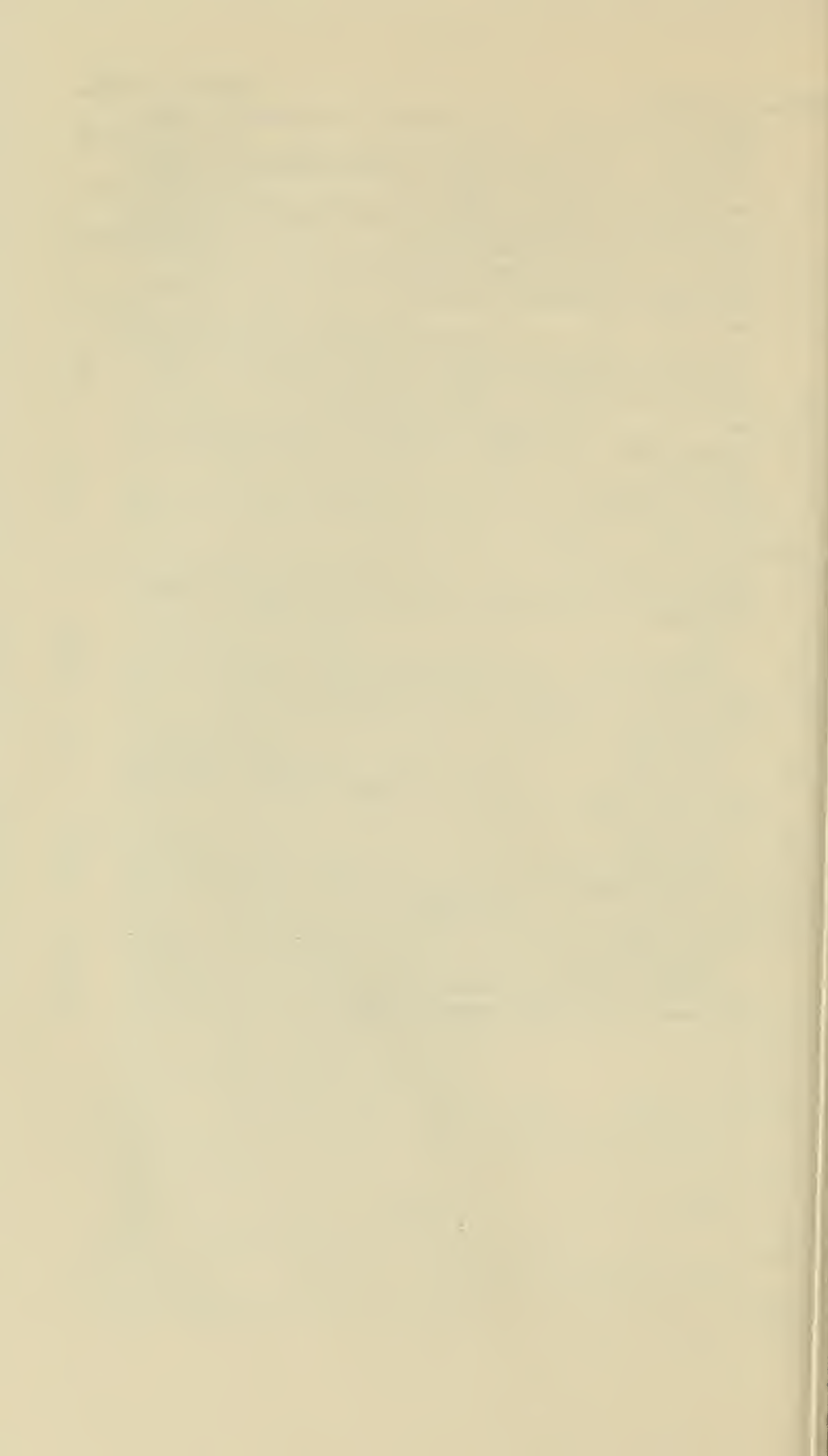
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15054

UNITED STATES OF AMERICA, APPELLANT

v.

BENJAMIN HARRISON AND JONES STEVEDORING COM-
PANY, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVI-
SION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from that part of a decree in admiralty entered on September 13, 1955, by the United States District Court for the Northern District of California, Southern Division, which dismissed the third party claim of the appellant-respondent against the appellee-respondent-impleaded (R. 36-37). The basic libel, filed by one Benjamin Harrison, a long-shoreman, against the appellant-respondent as owner of the vessel *S. S. Private John R. Towle*, alleged that the libellant had been injured as the result of the unseaworthiness of the said vessel and of the appellant's negligence (R. 3-7). The district court's jurisdiction to maintain this libel was invoked under the

Suits in Admiralty and Public Vessels Acts (R. 4). The appellant impleaded the appellee, the libellant's employer, pursuant to Admiralty Rule 56, on the ground that appellee had undertaken to hold appellant harmless from such liability (R. 15-21). The district court's jurisdiction to maintain this third party complaint was based upon 28 U. S. C. 1333 (1), 1345. The district court, resting its jurisdiction on the Public Vessels Act (R. 33), decided in favor of the libellant and of the respondent-impleaded (R. 36-37). A notice of appeal limited to the dismissal of the impleader was filed by the United States on December 8, 1955 (R. 38). The time for docketing the appeal was extended by order of the district court to and including March 7, 1956. The case was docketed in this Court on March 5, 1956 (R. 115). The jurisdiction of this Court rests on 28 U. S. C. 1291.

STATEMENT

1. The contract

In 1954 the appellee, Jones Stevedoring Company, had contracted to perform stevedoring services, *i. e.*, the loading and unloading of vessels for the United States Army in the San Francisco Bay area (R. 98). Clause 12 of the contract (R. 102-105) provided among others that the appellee:

* * * shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents or employees

in the performance of work under this contract. * * * (R. 102).

Liability was excepted in two circumstances which briefly may be described as follows:¹ (1) where the accident was caused in part by the unseaworthiness of the vessel or a defect of its equipment and if the stevedoring company by the exercise of due diligence either could not have discovered the unseaworthiness or defect, or could not have prevented the accident, and (2) where the accident was caused exclusively by the Government, or resulted from proper compliance of the stevedoring company with specific directions of the Contracting Officer.

2. The pleadings

In December 1954, one Benjamin Harrison, a long-shoreman employed by respondent filed a libel in admiralty against the United States. The libel alleged that the United States was the owner of the

¹ b. The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons:

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury or death.

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the Contracting Officer (R. 103).

S. S. *Private John R. Towle*, and that libellant, while unloading said vessel on October 14, 1954, slipped on an accumulation of oil thereby injuring his leg. The libel alleged two causes of action, the first one was based on negligence (R. 3-6), the second one on the alleged unseaworthiness of the vessel (R. 6-7). Appellant impleaded appellee, the libellant's employer, on the grounds that pursuant to the terms of the stevedoring agreement appellee had agreed to hold appellant harmless from the claims asserted by appellant and that libellant's injuries had been caused by appellee's fault (R. 15-21).

3. The evidence

The evidence given at the trial with respect to the libellant's accident may be summarized as follows:

The libellant, Benjamin Harrison, has been a longshoreman since 1944; he performed virtually all his work in the San Francisco Bay area (R. 44). On October 14, 1954, he was dispatched by the longshoremen's hiring hall to the S. S. *Private John R. Towle* (R. 43).² Harrison and his fellow longshoremen boarded the vessel at about 8 a. m. (R. 45). The foreman of Harrison's gang was one Christian Jensen (R. 45, 82-84) who for the preceding thirty years had been working in the San Francisco Bay area either as a longshoreman or as a longshoreman's foreman (R. 83).³ Jensen received his orders from the "walking boss" (R. 79), an employee of the stevedor-

² Ownership, management and control of the vessel by the appellant were conceded in the Answer (R. 8).

³ Jensen worked in this field intermittently from 1922 to 1934 and continuously since 1934 (R. 83).

ing company (R. 91). He would report to this walking boss if he had to make any requests or complaints or whenever he needed instructions (R. 86).

Jensen and his gang, including Harrison, were assigned to unload Hatch No. 1 of the vessel (R. 46). Since the hatches were open, the longshoremen immediately entered the inbetween or shelterdeck in which jeeps were stowed (R. 46-47, 74-75). In the hold Harrison noticed that most of the deck was covered with oil, which appeared to him to have been lubricating oil leaked out of the jeeps' transmissions or crankcases (R. 47-48, 63, 75-76).⁴ He advised the gang foreman, Jensen, of the dangerous condition of the floor and asked him to obtain sawdust (R. 48, 64, 76). Jensen thereupon left in order to obtain sawdust from the walking boss (R. 48, 64); in the meantime Harrison and the other members of his gang were cutting wires off the jeeps but did not unload them (R. 64).

According to Harrison's testimony, Jensen returned about five minutes later and stated that the walking boss had advised him that no sawdust was available (R. 48, 64). Harrison thereupon asked the foreman to obtain some sand instead (R. 49, 64). Jensen returned with the information that sand was not available either (R. 49, 64, 77), and left it up to the longshoremen whether they should work in these circumstances (R. 49). The walking boss, however, urged the men to unload the cargo anyhow, taking it easy and being as careful as possible (R. 49, 64-65, 77, 81). The men thereupon discussed the matter

⁴ The jeeps were old and damaged vehicles (R. 95).

among themselves and decided to go ahead with the unloading of the jeeps (R. 49, 77). This decision was influenced by the circumstance that they were handling military cargo, and that the vessel was in command of military officers (R. 82).

Jensen's testimony with respect to his attempts to obtain sawdust and sand for his crew varies slightly from that given by Harrison. Jensen stated that he found the walking boss on the main deck, and asked him for sawdust or any other substance that would cut the grease, otherwise the men would have to stop working (R. 87). The walking boss replied that such substances were not available (R. 87). During this conversation a uniformed officer was within hearing distance. Jensen did not talk to him (R. 87) but heard the walking boss' request for sand or sawdust and the officer's answer that none was available (R. 92). Although he was not introduced to this officer and had no specific reason for this assumption (R. 86-87, 91), Jensen believed that he was the receiving officer, because, later on, he sought to supervise the discharge of jeeps and to prevent any damage to them in this process (R. 91, 95-96). As a matter of fact when this "receiving officer" interfered with the unloading Jensen threatened to stop the work (R. 95-96).⁵

⁵ Jensen stated specifically that during the unloading the receiving officer "was interrupting me and the gang quite a bit":

"Q. What did this officer do?

"A. Just a moment. If they stick together like this, we have to hook on with wires and heave them out, and naturally you are all facing together, and of course those old cars, they was all damaged as they was, and you stand there and holler, 'Don't

When Jensen told the men of his gang that no substance to cut the oil was available he warned them that it was not safe to work and that they either should be careful or go home (R. 87). The men decided that they would stop the work (R. 88). Shortly thereafter the walking boss advised the longshoremen that the unloading of the vessel was urgent because it had to be reloaded in another port. He requested the men to work carefully and thus to make it possible for the vessel to leave port the same day (R. 88). At that time the walking boss was accompanied by a person in civilian clothes (R. 92), who seemed to Jensen to be the commanding officer (R. 88, 92).

Harrison and the other members of his gang thereupon proceeded to work on the jeeps and unloaded the shelter deck without incident (R. 49). This took about an hour (R. 80).⁶ Then they began to open the hatch to go down to the next lower deck (R. 50). They removed the hatch boards and started to take out the strongbacks, *i. e.*, the strong beams which support the hatch boards and which give the ship lateral support while it is at sea (R. 50).

Harrison was assisting in the removal of the fourth and last strongback, and was turning the beam over. At that very moment he slipped and the heavy strong-

damage them any more than they are. Don't damage them, don't damage them.'

"Q. That was this officer?

"A. Yes. And I said, 'Either we leave them alone or you keep your mouth shut,' I said, 'I am running this job and if we are not capable to do it,' I said, 'you may as well discharge us, get somebody else to do it.' " (R. 95-96.)

⁶ Harrison entered the vessel at 8 a. m. (R. 45). The accident occurred at 9:15 a. m., Finding IX (R. 31).

back⁷ fell across his leg (R. 53-54, 67-68). Harrison testified he believes that he slipped because his shoes had become oily (R. 53, 68, 81). He suffered a painful injury to his leg, and was unable to work for some five to six weeks (R. 52-62).

After the accident, the men stopped working (R. 56). Shortly thereafter the Port Transportation Officer (R. 106), who acted as a liaison between the vessel and the dock (R. 108), learned of the accident and, for the first time, of the oily condition of the deck (R. 107). He also received a request from the vessel for some substance to cover the oil (R. 107). He secured sand from a shed located 300 yards from the vessel (R. 107), and had it delivered there 15-20 minutes after Harrison had suffered his injury (R. 90). The longshoremen thereupon covered up the oil and resumed their work (R. 90-91, 108).

4. The decision below

The district court awarded judgment to libellant against appellant in the amount of \$2,000.00, and dismissed the third party complaint (R. 36-37). It found that libellant's injury was caused solely, directly and proximately by the unseaworthiness of the vessel and the negligence of the appellant in permitting oil to accumulate on the shelter deck (Finding XI, R. 31), and not "solely, and /or directly and/or proximately caused by the carelessness and/or negligence" of the stevedoring company (Finding XVI, R. 32-33). It also found that appellee had not failed to use

⁷ Harrison estimated the weight of the strongback roughly at 1,500 lbs. (R. 66).

reasonable care for the prevention of accidents, and that libellant's injuries were not "caused or contributed to in whole or in part by the improper and/or careless and/or negligent manner in which respondent-impleaded [appellee], its officers, agents or employees, conducted themselves or their activities on board said vessel" (Finding XVI, R. 33). The pertinent Conclusions of Law (III, V, VI, R. 34), stated that the libellant's injuries were caused solely and proximately by the negligence of appellant and the unseaworthiness of the vessel, that there was no negligence or fault on the part of appellee which proximately or to any degree caused or contributed to libellant's injuries, and that appellee could not have avoided the injury to the libellant by the exercise of due diligence.

Appellant does not appeal from the award of damages to the injured longshoreman. It limits its appeal to the dismissal of its third party claim against the impleaded stevedoring company (R. 38).

SPECIFICATION OF ERRORS

1. The district court erred in failing to find and hold that under the terms of the stevedoring contract, appellee was liable to hold appellant harmless from the liability to the libellant Harrison.

2. The district court erred in finding and holding that the libellant's injuries were caused solely and exclusively by the carelessness and negligence of the appellant, its employees and agents, and by the unseaworthiness of the *S. S. Private John R. Towle*.

3. The district court erred in finding and holding that libellant's injuries were not caused in part by

the carelessness and negligence of appellee, its officers, agents or employees and that appellee could not have prevented the injury by the exercise of due diligence.

4. The district court erred in finding and holding that appellee did not fail to use reasonable care for the prevention of accidents.

5. The district court erred in holding that the appellee is not liable over to appellant for the whole of the damage award to the libellant.

6. The district court erred in dismissing appellant's petition under Rule 56 to bring in appellee as a third party.

SUMMARY OF ARGUMENT

In this case a longshoreman was injured while working under conditions known to be unsafe to his employer, the appellee stevedoring company, as well as to the appellant ship. The court below held that the ship, although liable to the longshoreman, was not entitled to be reimbursed by the stevedoring company. This ruling is direct conflict with the decisions of this Court in *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, certiorari denied, 338 U. S. 904 and *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181. These decisions hold that a stevedoring company owes the duty to stop the work while a known danger exists. If it permits its employees to work and the ship is held responsible for injuries suffered in such circumstances, the ship is entitled to be reimbursed by the stevedoring company. These decisions of this Court are fully supported by an analysis of the nature of the right to indemnity and

the legal relationship between ship and stevedoring company.

I

Appellant's right to indemnity is based primarily upon the indemnity clause. Full understanding of that clause, however, requires a short discussion of the nature of indemnity.

Where, as a result of a breach of contract, the promisee has been subject to liability to a third person, reimbursement—or indemnity as it is frequently called—constitutes an element of the damages to which the promisee is entitled from the promisor. *Mowbray v. Merryweather*, [1895] 2 Q. B. 640. This liability for reimbursement exists in the absence of an express indemnity agreement and is predicated upon the breach of the implied undertaking to perform the contract in a careful and prudent manner. *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124.

Basically, the indemnitee's right to reimbursement is not defeated by his concurrent fault. The indemnitor is usually a specialized contractor selected by the indemnitee for his professed expertise, and the indemnitee has the right to rely on his contractor's warranty that he will exercise the skill of his trade. *Boston Woven Hose, etc., Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657; *Ryan Co. v. Pan-Atlantic Co.*, 350 U. S. 125. However, some courts have denied relief to an indemnitee on the ground that he and his contractor were *in pari delicti* or that he was guilty of primary or active negligence. Express indemnity clauses, such as the one here involved, are designed to eliminate this un-

certainty and to fix the ultimate allocation of the financial responsibility.

The express clause of the stevedoring contract provides that the stevedoring company undertakes to indemnify the ship where the injuries were caused either in whole or in part by the company's fault. The only exceptions are that the accident was caused by the unseaworthiness of the vessel, and the stevedoring company either could not have discovered the unseaworthiness, or could not have prevented the accident; that the accident was caused solely by the ship; or that it resulted from proper compliance by the stevedoring company with specific directions of the contracting officer.

This case comes squarely within the terms of the indemnity clause and none of the exceptions are applicable. The accident plainly was caused in part by appellee's negligence. Its representatives on board the vessel knew of the dangerous condition of the deck and should have stopped the work. According to the very terms and purposes of the express indemnity clause, appellant's concurrent fault, if any, does not defeat appellee's liability to reimburse the ship, nor is the ship's right to indemnity defeated by its request to continue the work or its failure to furnish sand.

The request to continue the work does not bring the case within the exception that the accident resulted solely from proper compliance with specific directions of the contracting officer. There was no indication that the request emanated from the "contracting officer." Moreover, a request to a stevedoring company

usually is only in the nature of a suggestion; the expert contractor has been hired for the very purpose of exercising his judgment and only "the clearest requirement" can relieve the contractor from exercising ordinary prudence. *McGeeney v. Moran Towing Corp.*, 149 F. 2d 791, 793 (C. A. 2); *The Robert R.*, 255 Fed. 37, 40 (C. A. 2). In view of appellee's plain duty to stop operations, compliance with the ship's request would not have been "proper."

Similarly, the ship's failure to supply sand did not relieve the stevedoring company of its responsibility in the premises. To the contrary, it had the duty to be "energetic" in trying to obtain it from other sources. *Metcalf v. Chiarello*, 294 Fed. 29, 30 (C. A. 2). This did not cast an undue burden upon the company which was fully familiar with the San Francisco Bay area.

The accident thus was caused in part by appellee. It knew of the unsafe condition of the deck and could have prevented the accident either by stopping the work or by being insistent in obtaining the sand.⁸

The express indemnity clause thus was applicable.

II

The findings adverse to appellant (pp. 8-9) are not conclusive on this Court. As Findings of Fact they would be clearly erroneous, the error being based upon a mistaken evaluation of the duties assumed by a stevedoring company. Actually, however, in the absence of any dispute as to material facts, the findings are merely ruling on proper standards of care.

⁸ An hour elapsed between the start of the work and the time which Harrison suffered his injuries.

Thus they are in effect Conclusions of Law and fully reviewable in this Court. *Barbarino v. Stanhope SS Co.*, 151 F. 2d 553 (C. A. 2); *Bonnewell v. United States*, 170 F. 2d 411 (C. A. 4).

ARGUMENT

The facts presented by this appeal are simple and undisputed. A longshoreman employed by the appellee stevedoring company was injured, while unloading appellant's vessel, as the result of the slippery condition of the vessel's deck. Appellant and appellee were both aware of the danger. Appellant apparently pointed to the need for speed and asked whether the unloading could proceed if precautionary measures were taken (p. 7); appellee permitted the work to continue in spite of the peril to which it exposed its employees.

The question presented by this appeal is whether having been held liable to the injured longshoreman, the appellant vessel is entitled to be reimbursed by the appellee stevedoring company.

We submit that this question must be answered unequivocally in the affirmative in view of the directly controlling decisions of this Court in *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, certiorari denied, 338 U. S. 904,⁹ and *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181.¹⁰ In those cases, just as here, longshoremen had been injured as the result of defective conditions on a vessel

⁹ See also the companion case of *United States v. Arrow Stevedoring Co.*, 175 F. 2d 333, certiorari denied, 338 U. S. 904.

¹⁰ This Court has held most recently that the result of this case was fully supported by the doctrines of indemnity. *United States v. Marshall*, 230 F. 2d 183, fn. 10 at 194.

of which the stevedoring company was fully aware. In both cases the district court held in favor of the longshoreman against the vessel but dismissed the third party action against the stevedoring company. This Court reversed both times on the impleader issue, holding that a stevedoring company, which works its employees in spite of its knowledge of a dangerous condition or defect of the vessel, must reimburse or indemnify the ship for its liability to an injured longshoreman. In this situation the stevedoring company "clearly owed the duty to see that none of its stevedores should work under it [the defective hatch door] until the danger known to exist was removed."¹¹ A finding of fact, similar to the one here involved, that the stevedoring company's conduct was not a proximate cause of the injury to the longshoreman was set aside by this court as clearly erroneous.¹² *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 establishes that the right to indemnity is not curtailed by the circumstance that the defect was known to the vessel.¹³

¹¹ *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, 321 (C. A. 9), certiorari denied, 338 U. S. 904. See also *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181, 182. In the companion case of *United States v. Arrow Stevedoring Co.*, 175 F. 2d 333, 334 (C. A. 9), certiorari denied, 338 U. S. 904, this Court characterized as negligence, if not recklessness, the stevedoring company's "working of the men in the known dangerous conditions there existing."

¹² *United States v. Arrow Stevedoring Co.*, *ibid.* at 330.

¹³ For a detailed discussion of the rule that, in view of its superior experience, the stevedoring company has primary responsibility in determining whether working conditions are safe and that it is not even exonerated where it follows improper advice given by the ship, see pp. 28-29.

We could well end our brief here and confidently rest our argument on the authority of the *Arrow* and *Rothschild* cases. However, it may prove useful to submit to this Court a more detailed analysis of the basis of a ship's right to reimbursement from a stevedoring company. The recent decision of the Supreme Court of the United States in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124 has made this a timely, and incidentally more simple, task.

I

Appellant is entitled to indemnity under the terms of the stevedoring contract and of the indemnity clause contained in it

Having been held responsible to a longshoreman injured during the unloading of a vessel, appellant seeks to be reimbursed by the stevedoring company which undertook to discharge the ship. Since the stevedoring contract contained express provisions dealing with the ship's right to indemnity appellant's claim rests primarily on this indemnity clause. *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 183 F. 2d 902 at 906, 910 (C. A. 9); *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, 332 (C. A. 9). On the other hand, as this Court has explained in *Booth-Kelly v. Southern Pacific Co.*, 183 F. 2d 902, 906, the proper meaning and purpose of that clause can be ascertained only against the background of the general law governing indemnity.

A. The purpose of an express indemnity clause is essentially to clarify the legal positions of the parties in the case where the indemnitor and indemnitee are both to blame

1. *Indemnity or reimbursement as a remedy for breach of contract.* The basis of appellant's claim to be held harmless by appellee for the damages awarded to the injured longshoreman is the consideration that appellee had undertaken not only to unload the vessel, but to unload it safely and competently,¹⁴ and that this obligation was breached when appellee permitted its longshoremen to work under patently dangerous conditions.

The term "indemnity" is frequently used in the field of quasi-contracts to shift the incidence of tort liability according to equitable principles.¹⁵ This definition, however, does not, and does not intend to,¹⁶ take into consideration the instances—of at least equal importance—in which indemnity is sought as a means of reimbursement for damages suffered by the indemnitee as the result of a breach of contract by the indemnitor.

¹⁴ *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, 131.

¹⁵ Woodward, *Law of Quasi-Contracts*, p. 409; Keener, *Quasi-Contracts*, p. 408; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 147; *City of Chicago v. Robbins*, 2 Black 418; *Robbins v. City of Chicago*, 4 Wall. 657; *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316; *George's Radio v. Capital Transit Co.*, 126 F. 2d 219, 222 (C. A. D. C.); *Restatement of the Law of Restitution*, Secs. 76, 86.

¹⁶ *Restatement of the Law of Restitution*, pp. 328-329; cf. Keener, *Quasi-Contracts*, p. 25.

Since the turn of the century it has become well established that such "indemnity" or better reimbursement is a proper measure of damages to compensate for losses from a breach of contract.¹⁷ The leading case in this field, *Mowbray v. Merryweather*, [1895] 2 Q. B. 640,¹⁸ was quickly followed in this country. *Boston Woven Hose, etc., Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657 (1901) ¹⁹ held that where the purchaser of a boiler had become liable to third persons as the result of an explosion of the boiler, he was entitled to indemnity from the boiler-maker as damages for breach of warranty. And *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 217, 67 N. E. 439 (1903), decided that where a contractor had become liable to third persons as the result of the negligent performance of a contract by a subcontractor, the latter was liable to indemnify the former, even where the parties had not expressly

¹⁷ Cf. *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145.

¹⁸ A ship had engaged a stevedoring company to discharge the cargo and agreed to furnish all the necessary cranes, winches, chains, and other equipment needed for that purpose. One of the chains was defective and broke, injuring one of the stevedoring company's employees. The longshoreman recovered £125 from his employer, who in turn sought to recover this sum from the ship. The Court of Appeals affirmed a judgment for the plaintiff. It held that in the circumstances of the case the ship had given an implied warranty that the chain was sound and that this warranty had been breached. Moreover, it was within the contemplation of the parties that a defect in the chain might result in injury to a longshoreman for which his employer would be held responsible. Hence, these damages were not too remote and the stevedoring company was entitled to be indemnified for the sum paid to its employee, and was not limited to nominal damages.

¹⁹ Quoted with approval in *Union Stock Yards Co. v. Chicago, etc., R. R. Co.*, 196 U. S. 217, 226-227 (1905).

stipulated for such indemnity. *Schubert v. Schubert Wagon Co.*, 249 N. Y. 253, 257, 164 N. E. 42, 43, established generally that reimbursement is based upon the breach of the duty to perform faithfully, *i. e.*, that it is compensation for having furnished substandard services.

This analysis of the nature of the right to reimbursement was recently reexamined in *Ryan Co. v. Pan-Atlantic Co.*, 350 U. S. 124. The issue in the *Ryan* case was the same one which was before this Court in *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, 332, certiorari denied, 338 U. S. 904; *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181; *States S. S. Co. v. Rothschild International Stevedoring Co.*, 205 F. 2d 253, 256-257, *viz*, whether Section 5 of the Longshoremen's and Harbor Workers' Compensation Act prevents a ship, which had to pay damages to a longshoreman, from seeking reimbursement from the longshoreman's employer. The Supreme Court analyzed the nature of the right of indemnity or reimbursement and determined that it was based, not upon any tort, but upon a breach of the stevedoring contract and that Section 5 was not supposed to bar such contractual claim.²⁰ In this connection the Court stated:

* * * the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo

²⁰ The prevailing and dissenting opinions agreed that Section 5 does not preclude reimbursement of the ship by the stevedoring company where, as here, the stevedoring contract contains an express indemnity clause. *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124 at 130 and 141.

properly * * *. [350 U. S. at 131].

* * * The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner * * *. [350 U. S. 131-132.] [Emphasis in original.]

Again, at pp. 133-134, the Court explained the legal relations of the parties:

* * * That [stevedoring] agreement necessarily includes petitioner's [the stevedoring company's] obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of non-contractual relationship. *It is of the essence of petitioner's stevedoring contract.* It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service. [Emphasis supplied.]

2. *The express indemnity clause in the contract is designed to alleviate uncertainties in the application of the indemnity rules.*

a. A considerable degree of difficulty in the operation of the indemnity rules is occasioned by the circumstance that the indemnitee himself usually had committed some wrong, otherwise he would not have

been held responsible to the third party,²¹ here the longshoreman. As the Supreme Court pointed out in *Union Stock Yards Co. v. Chicago, etc., R. R. Co.*, 196 U. S. 217, 218, the typical situation in which indemnity may be awarded is one in which:

* * * [t]he principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer [the indemnitor], and the other [the indemnitee] has been held liable to third persons *for failing to discover or correct the defect* caused by the positive act of the other [the indemnitor]. [196 U. S. at 228.] [Emphasis and matter in brackets supplied.]

This culpability of the indemnitee does not defeat his right to reimbursement. The duty breached by him was owed to the original plaintiff, not to the indemnitor (*Mowbray v. Merryweather*, [1895] 2 Q. B. 640. As Chief Justice Holmes pointed out in *Boston Woven Hose, etc., Co. v. Kendall*, 178 Mass. 232, 236–237, 59 N. E. 657, 658, the negligence of the indemnitee ordinarily is induced by the very representation of the contractor that he will perform his undertaking properly. Certainly, a customer is entitled to rely to a large extent on the specialized knowledge and expertise of contractors “professing competence and experience” and who warrant the skill of their trade (“*spondentes peritiam artis*”). *H. & C. Grayson v. Ellerman Line*, [1920] A. C. 466, 472, 474 (H. of L.). See also *Bethlehem Shipbuilding Corp. v. Joseph Guttradt Co.*, 10

²¹ Except, of course, in the instances where liability is imposed without fault, as, *e. g.*, in the case of the breach of warranty of seaworthiness.

F. 2d 769, 772 (C. A. 9); *Seaboard Stevedoring Co. v. Sagadahoc S. S. Co.*, 32 F. 2d 886 (C. A. 9).

As the Supreme Court held in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, 134-135:

* * * it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. * * * ²²

The circumstance that the indemnitee usually has committed a tort against the injured person, however, does inject a disturbing element into this area and courts frequently have determined the indemnitee's right to recover damages for the breach of the indemnitor's undertaking to perform safely and properly, on the basis of formulae borrowed from the law of torts and quasi-contracts. Relief has been granted and withheld depending on the determination *vel non* that the parties were *in pari delicto* ²³ or that the negligence of the indemnitor was concurrent rather than primary and secondary ²⁴ or that the indemnitee

²² To the same effect: *Derry Electric Co. v. New England Telephone & Telegraph Co.*, 31 F. 2d 51, 52 (C. A. 1); *Manning Mfg. Co. v. Hartol Products Corp.*, 99 F. 2d 813, 814 (C. A. 2); *General Accident, etc. v. Goodyear Tire & Rubber Co.*, 132 F. 2d 122, 125 (C. A. 2); *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 183 F. 2d 902, 907 (C. A. 9); *Restatement of the Law of Restitution*, Secs. 93, 95, comment a, par. 2; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 156-158; Note: *Contribution and Indemnity Between Joint Tort Feasors*, 45 Harv. Law Rev. 349, 351-352.

²³ *Union Stock Yards Co. v. Chicago, etc., R. R. Co.*, 196 U. S. 217, 228; see also *States S. S. Co. v. Rothschild International Stevedoring Co.*, 205 F. 2d 253 (C. A. 9).

²⁴ *Torres v. The Kastor*, 227 F. 2d 664 (C. A. 2).

had been guilty of active rather than passive negligence.²⁵

Only the recent decision of the Supreme Court in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, 133 had settled that the concepts of primary and secondary negligence or of active and passive tortious conduct can have no applicability in this area of liability which rests upon a contractual basis.

b. To this area of doubt, especially as it existed prior to the *Ryan* case, express indemnity clauses of the kind here involved serve the purpose of establishing a rule of thumb in order to determine whether or not the ship is entitled to reimbursement²⁶ and thus to avoid much unnecessary litigation and the wasteful requirement that both parties have to take out liability insurance.²⁷

B. Appellee's negligence was one of the proximate causes of Harrison's injuries. Appellant's acts or omissions did not relieve appellee from its liability, and this accident does not come within any of the exceptions of the indemnity clause

According to Clause 12 of the Stevedoring Agreement (R. 102-105) appellee agreed to be responsible and to hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury or death of persons:

²⁵ *McFall v. Compagnie Maritime Belge*, 304 N. Y. 314, 328, 529, 107 N. E. 2d 463, 471; cf. the discussion in the Court of Appeals in *Palazzolo v. Pan-Atlantic S. S. Corp.*, 211 F. 2d 277, 279 (C. A. 2), affirmed *sub. nom. Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124.

²⁶ Cf. *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 183 F. 2d 902, 910 (C. A. 9).

²⁷ Cf. the insurance clause of the stevedoring contract at R. 103, 104.

* * * occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents or employees in the performance of work under this contract.²⁸ * * *

Appellee also agreed to take out commensurate insurance (R. 103-104).

The basic test as to whether appellant is entitled to indemnity thus is whether the bodily injury of the longshoreman for which the ship has been held responsible was occasioned either in whole or in part by the negligence or fault of the appellee in the performance of work under the contract.

There can be no question that the longshoreman's injury was caused in whole or in part by the appellee's negligence. The stevedoring company's representatives on board the vessel, the foreman and the "walking boss," both were aware of the dangerous, slippery condition of the deck. In those circumstances, appellee "clearly owed the duty to see that none of its stevedores should work until the danger known to exist was removed." *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, 331 (C. A. 9), certiorari

²⁸ This liability is subject only to the following exceptions: (1) that the accident was caused by the unseaworthiness of the vessel or a defect of the equipment, and the stevedoring company exercising due care either (a) could not have discovered the unseaworthiness or the defect, or (b) could not have prevented the accident; and (2) that the accident resulted (a) solely from an act or omission of the Government, or (b) from proper compliance of the stevedoring company with specific directions of the contracting officer. These are not even true exceptions. In exceptions 1 (a), 1 (b), and 2 (a) the stevedoring company is not guilty of any negligence or fault, hence, the indemnity clause would not come into play in any event; in situation 2 (b) the vessel expressly assumes responsibility.

denied, 338 U. S. 904; *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181, 182 (C. A. 9); *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, 401 (C. A. 2); see also *American Stevedores v. Porello*, 330 U. S. 446, 449. Indeed, as this Court has held in *United States v. Arrow Stevedoring Co.*, 175 F. 2d 333, 334, certiorari denied, 338 U. S. 904, appellee's behavior constituted recklessness rather than ordinary negligence.

Appellee is not relieved of its liability by virtue of the vessel's concurrent fault—if any—*i. e.*, its apparent request that the longshoremen attempt to unload the jeeps carefully in spite of the oily deck, and its failure to furnish sand or sawdust.

1. *Appellant's concurrent negligence would not defeat appellee's contractual liability to reimburse the ship.* Assuming for the sake of argument that appellant was guilty of negligence in permitting oil to accumulate on the shelter deck,²⁹ appellee still would not be relieved of its contractually assumed liability to reimburse appellant.

We have shown (pp. 20–23) that even in the absence of an express indemnity clause, reimbursement would not be precluded by the indemnitee's concurrent fault, in particular in those instances where the indemnitor is a specialist contractor.³⁰ Moreover, it is the very

²⁹ The slippery condition of the deck probably made the vessel unseaworthy and thus liable to the longshoreman. The record, however, does not indicate whether this condition was caused by the negligence of appellant's officers or employee's or by circumstances completely beyond their control.

³⁰ See *e. g.*, *United States v. Savage Truck Line Co.*, 209 F. 2d 442 (C. A. 4), certiorari denied, 347 U. S. 952, where a shipper,

purpose of express indemnity clauses to eliminate the legal confusion frequently caused by the concurrent fault of the indemnitee (p. 23). In this case, the very terms of the clause show that such concurrent fault is not supposed to affect the right to reimbursement. The contract provides that appellee is bound to reimburse appellant for all accidents caused in whole or in part by appellee's fault. Liability is precluded only where the injury results solely from an act or omission of the ship. In other words, the fact that an accident was caused jointly by appellant and appellee does not defeat appellant's right to indemnity.

Finally it is significant that the indemnity clause in *American Stevedores v. Porello*, 330 U. S. 446, although far less explicit than the one here involved, still was interpreted as providing for indemnity in the event of the concurrent fault of the ship. In that case the stevedoring company agreed to be responsible for all damage or injury to persons or cargo "through the negligence or fault of the Stevedore" (330 U. S. at 457). The contract thus omitted the words present in this contract, *viz*, "occasioned either in whole or in part." The Court of Appeals had held that the clear meaning of the clause was that the stevedoring company would be liable as long as the accident was caused in whole or in part through its negligence, and

who had improperly loaded a truck to the knowledge of the carrier, had been held responsible to third persons injured in an accident caused by the improper loading. The court held that the shipper who had created the dangerous condition himself, nevertheless, was entitled to be indemnified by the carrier.

that this liability would not be defeated by the ship's concurrent liability. The Supreme Court reversed on the ground that the clause was ambiguous and that proffered evidence relating to the intention of the parties should have been taken (330 U. S. at 457, 458). Upon remand, the District Court upheld the Court of Appeals' interpretation of the indemnity clause. *Porello v. United States*, 94 F. Supp. 952 (S. D. N. Y.). If concurrent negligence of the vessel did not defeat its right to indemnity under the *Porello* clause, *a fortiori*, it cannot have that effect under the explicit language of this contract.

2. *Appellant's request to unload the vessel in spite of the slippery condition of the deck did not defeat its right to indemnity.* According to the indemnity clause the right to reimbursement does not extend to injuries which:

* * * resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the Contracting Officer.

None of the conditions of this exception to the indemnity clause has been met. The evidence is hazy as to the identity of the officer who requested the unloading of the vessel in spite of the slippery deck. There is no allegation, no finding, nor even a scintilla of evidence that he was the "Contracting Officer." Neither the findings nor the testimony reveal any "specific instruction". At most, it appears that some officer advised the "walking boss" of the fact that the vessel was pressed for time and suggested that the long-

shoremen try their best in the circumstances.³¹ The ultimate decision plainly was left to the stevedoring company and the longshoremen. Nor can it be said that appellee's agents on board ship were so overawed by the military that they considered every suggestion to be a command. The testimony of the foreman Jensen (pp. 5-6, n. 5) shows beyond doubt that he was "running the job" and would not tolerate any interference with it. Finally, in view of the stevedoring company's duty to stop operations when they became unsafe (pp. 24-25), compliance with instruction to unload in spite of the slippery deck would not have been "proper compliance" within the meaning of the contract.³²

The result would be the same even in the absence of the express indemnity clause. A stevedoring company is not the ship's agent; it is an independent contractor. *The Adah*, 258 Fed. 377, 380 (C. A. 2); *Cory Bros. & Co. v. United States*, 51 F. 2d 1010, 1013-1014; *McGeeney v. Moran Towing Corp.*, 149 F. 2d 791, 793 (C. A. 2). Moreover, as a specialist and experienced technician in the field of safely loading and unloading vessels,³³ the stevedoring company has primary responsibility for the selection of the methods

³¹ *McGeeney v. Morgan Towing Corp.*, 149 F. 2d 791 (C. A. 2), indicates that usually the ship's "wishes" and "requests" must be considered to be in the nature of suggestions.

³² "Only the clearest requirement to do something which is dangerous can relieve the contractors from the exercise of ordinary prudence." *The Robert R.*, 255 Fed. 37, 40 (C. A. 2).

³³ *McGeeney v. Moran Towing Corp.*, 149 F. 2d 791, 793 (C. A. 2); *Cornec v. Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 9), certiorari denied, 284 U. S. 621; *The Evelyn*, 282 Fed. 250, 252 (C. A. 2).

in which these operations are carried out.³⁴ In these circumstances it was the contractor's duty to stop the work as soon as he realized that it is unsafe. *McGeeney v. Moran Towing Corp.*, 149 F. 2d 791, 793; *The Robert R.*, 255 Fed. 37, 39 (C. A. 2); *The Adah*, 258 Fed. 377, 380 (C. A. 2).³⁵

And this responsibility persists even where the ship requests the stevedoring company to go ahead with the work in spite of the danger. The reason for this rule is that the stevedoring company has been hired as an experienced specialist for the very purpose of exercising its judgment in these matters. A request by the ship therefore does not affect the contractor's responsibility toward third parties and even the ship. *McGeeney v. Moran Towing Corp.*, 149 F. 2d 791, 793 (C. A. 2).³⁶

3. *Appellee is not relieved of liability by virtue of the ship's failure to furnish sand or sawdust.* The ship's failure to supply sawdust or sand did not relieve the stevedoring company of responsibility either. The paramount duty of the stevedoring company is to load or unload the cargo safely (pp. 19-20). If this

³⁴ *Porello v. United States*, 153 F. 2d 605, 608 (C. A. 2), reversed on other grounds, 330 U. S. 446; *Seaboard Sand & Gravel Co. v. Moran Towing Corp.*, 154 F. 2d 399, 401 (C. A. 2).

³⁵ In that case the stevedoring company was held responsible to a third party for failure to trim the cargo, in spite of the fact that the stevedoring contract did not provide for such service. Note, under the clause here involved, the test is whether the injury to the third person was caused by the contractor's fault.

³⁶ There the stevedoring company was held primarily responsible and the Court of Appeals upheld the District Court's refusal to divide damages between the stevedoring company and the ship. To the same effect *The Evelyn*, 282 Fed. 250.

is not feasible in the absence of some equipment, the stevedoring company must try to obtain it either from its own supplies or from the vessel. An initial refusal on the part of the ship does not permit the stevedoring company to operate in an unsafe manner. It must be "energetic" in trying to secure the proper implements either from the ship or other sources. *Metcalf v. Chiarello*, 294 Fed. 29, 30 (C. A. 2). Similarly, in *Smith v. Nicholson Transit Co.*, 39 F. Supp. 795 (W. D. N. Y.), where a barge had been damaged as the result of improper stowage by a stevedoring company, which had not been furnished proper dunnage by the steamship which utilized its services, the court held that the steamship's failure to furnish dunnage did not relieve the stevedoring company from liability to the barge. Thus the test of the indemnity clause again has been met, *i. e.*, the injury has been caused in whole or in part by the negligence or fault of the stevedoring company or its agents.³⁷

In this case, the accident could have been avoided had appellee been *energetic* or astute in obtaining sand. The longshoreman suffered his injuries only after all of the jeeps had been removed from the shel-

³⁷ In *Metcalf v. Chiarello* and *Smith v. Nicholson Transit Co.*, in the absence of an express indemnity agreement, the stevedoring company was held responsible only for one-half of the damages. However, as we have shown (p. 23) it was the very purpose of the express indemnity clause to provide for full reimbursement of the vessel in all situations in which the stevedoring company was to any extent responsible for the "loss, damage, liability and expense."

ter deck. The unloading of the jeeps took about an hour (p. 7); subsequent events proved that an abrasive could have been procured within 15-20 minutes (p. 8). Thus the accident would have been prevented if appellee had been insistent in demanding that the ship obtain sand or sawdust, or if itself had taken the initiative in procuring such gritty material. Moreover, it should be remembered that appellee was in a better position to obtain the sand. Appellant's officers aboard the vessel probably were strangers in port. Appellee's employees on the other hand, were fully familiar with the San Francisco Bay area.³⁸ In these circumstances it may be assumed safely that they were aware of the existence of the sand blasting shops from which the sand actually was obtained (R. 107), or of some other source of abrasives in the vicinity of the vessel.

These reflections also show that the exception set forth in par. b (1) of the indemnity clause (R. 103) is not applicable. Under that provision appellee is relieved from liability where the accident is caused in part by the unseaworthiness of the vessel and appellee either could not discover the defect or through the exercise of diligence could not have avoided the injury. Appellee was aware of the unsafe condition of the vessel, and it could have avoided the accident either by stopping the work or by exercising due diligence in obtaining sand.

³⁸ The foreman, Jensen, had been working as a longshoreman and foreman in this vicinity for about thirty years.

II

The findings of the court below do not preclude full review of the record

We have established on the preceding pages of this brief that Harrison's accident, as a result of which the Government has been subjected to liability, was occasioned at least in part by appellee's failure to stop the work while the dangerous condition existed and its neglect itself to obtain, or to cause the ship to obtain, sand or some other gritty substance. Accordingly, under the decisions of this Court in *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, 333, certiorari denied, 308 U. S. 904, and *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181, as well as pursuant to the terms of the express indemnity clause contained in the stevedoring contract, appellant is entitled to be reimbursed in full.

This evaluation of the testimony in the record is not precluded by the district court's Findings Nos. XV and XVI, R. 32-33, to the effect that the accident was caused solely by appellant's negligence; that appellee did not fail to perform according to the terms of the stevedoring contract; that appellee did not fail to provide proper safeguards or to use reasonable care for the prevention of foreseeable accidents; in sum, that the longshoreman's injuries were not caused in whole or in part by any neglect on the part of appellee in the conduct of its activities aboard the vessel.

Assuming for the sake of argument that these findings of the district court are true findings of fact ³⁹

³⁹ *McAllister v. United States*, 348 U. S. 19, establishes that in admiralty cases the Courts of Appeals have no greater scope of

they are as “plainly erroneous” as those set aside by this Court in *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329, 330. However, in the absence of any dispute as to material facts, the findings that appellant was exclusively negligent, that appellee had used all reasonable care in the premises, and that the longshoreman’s injury was not caused by appellee’s fault or neglect, were rulings as to the proper standard of care. As Learned Hand, J., pointed out in *Barbarino v. Stanhope S. S. Co.*, 151 F. 2d 553, 555 (C. A. 2):

* * * to fix any standard of care two conflicting interests must be always appraised and balanced * * *. *Such choices are the very stuff of law*, and as to them the appellate courts have no reason to defer to the decisions of courts of first instance. [Emphasis supplied.]

Rulings on the issue of negligence based on undisputed facts and limited to establishment of standards of care thus are not genuine findings of fact but conclusions of law.⁴⁰ As such they are freely reviewable. *Barbarino v. Stanhope S. S. Co.*, 151 F. 2d 553 (C. A. 2); *Kreste v. United States*, 158 F. 2d 575, 577 (C. A. 2); *Guerrini v. United States*, 167 F. 2d 352, 356 (C. A. 2), certiorari denied, 335 U. S. 843; *Bonnewell v. United States*, 170 F. 2d 411, 412 (C. A. 4); *Lynch v. Agwilines*, 184 F. 2d 826, 828, modified as to costs, 186 F. 2d 796 (C. A. 2).

review over findings of fact than they have in civil cases under Rule 52 (a), Federal Rules of Civil Procedure.

⁴⁰ Significantly, Findings of Fact XV and XVI (R. 32-33) on the issue of negligence are identical in substance with Conclusions of Law Nos. III-VI (R. 34).

CONCLUSION

For the above reasons, it is respectfully submitted that the decision below should be reversed and that the cause be remanded to the district court with instruction to enter judgment in favor of the United States for all damages and costs awarded to the libellant longshoreman against appellant.

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JUNE 1956.

No. 15,054

IN THE

United States Court of Appeals
For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

BENJAMIN HARRISON & JONES STEVE-
DORING COMPANY,
Appellees.

BRIEF FOR APPELLEE JONES STEVEDORING COMPANY.

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FILED

AUG -8 1956

PAUL P. O'BRIEN, CLERK

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No. 15054

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THE UNITED STATES OF AMERICA,
Appellant,

VS.

BENJAMIN HARRISON & JONES STEVEDORING COMPANY,
Appellees.

BRIEF FOR APPELLEE JONES STEVEDORING COMPANY.

STATEMENT OF PLEADINGS AND JURISDICTION.

This appeal in admiralty by the United States of America (hereinafter referred to as "the Government") concerns a final decree (R. 36-37) entered on September 14, 1955, against the Government and in favor of the appellee, Benjamin Harrison, in the sum of \$2,000, and in the same final decree entered on the same date dismissing the appellee, Jones Stevedoring Company (hereinafter called "Jones").

The libel was filed under the Suits and Admiralty Act and Public Vessels Act, in which the appellee Harrison charged the Government with liability for injuries sustained by him while employed as a long-

shoreman aboard the vessel SS "Private John R. Towle," a public vessel owned and operated by the Government, as a result of the negligence and unseaworthiness of the vessel. The Government, by way of petition (R. 15) under Admiralty Rule 56, sought recovery over against Jones, who, by answer (R. 22) denied all liability to the Government and all liability to Harrison, excepting that which it had assumed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901-950.

STATEMENT OF THE CASE.

Inasmuch as the Government, in its statement, has omitted certain significant facts, it becomes necessary on the part of appellee Jones to submit this statement of the case.

On October 14, 1954, appellee Harrison was employed by Jones as a longshoreman, together with other stevedores, to assist in unloading certain jeeps from the vessel SS "Private John R. Towle," which at that time was located at the Port of Benicia on San Francisco Bay (R. 45-62). The gang boss at the time was Christian Jensen (R. 45). There was also a walking boss in charge of the entire operation, employed by Jones, on or about the vessel during the unloading operation (R. 86). Jones did not have a terminal building at the Port of Benicia, and the company was required to bring along its own gear to use in unloading the cargo (R. 77). When the stevedoring gang

went to work the morning of October 14, 1954, the work of unloading was confined to No. 1 hatch, which was open, and the men proceeded to the shelter deck of this hatch to discharge the cargo, which consisted of Army jeeps (R. 46). The jeeps were lashed with wire and it was required that the wires be cut before they could be unloaded from the vessel (R.47).

The stevedoring gang proceeded to discharge the jeeps from the shelter deck and got them all out and then started to uncover the shelter deck so they could get to the deck below to unload the jeeps that were on that deck (R. 49). The strongbacks on the shelter deck were being taken off and placed on the wings on the in-shore side of the vessel (R. 49-50-51). Harrison and his partner had removed three of the four strongbacks and were in the process of lowering and placing in the wing of the shelter deck the fourth strongback when, in an attempt to place the strongback on its side, the beam started to tilt and Harrison started to slip, and the beam fell across Harrison's leg (R. 53).

An accumulation of grease and oil was located in the position where the strongback was being layed to rest, and this caused Harrison to slip, and consequently, caused his leg to be pinned under the strongback (R. 53). Between the time that the longshoremen started to cut the wires holding the jeeps and the time that the actual operation of unloading the jeeps commenced, Jensen, the gang boss, and the walking boss and an officer of the vessel had a conversation concerning sawdust or sand which could be sprinkled on the oil or grease which was located in the wings of the shelter

deck under the jeeps (R. 77-78-86-87-88-91-92-95). The longshoremen were advised by Jensen that they could stop work when they were advised no sawdust or sand was available (R. 87). The commanding officer and the walking boss then came down and talked to the men and told the men that the ship had to go somewhere else to load and was in a hurry, and if the men were careful they could work the vessel and get the ship out of that port and on to another port to load the following day (R. 91-95). The men decided, after talking the matter over with Jensen, to commence work because of the plea of the commanding officer (R. 88). It was about 15 or 20 minutes after the accident that a truck came with sand, which sand had been procured by a member of the Transportation Corps at the Benicia Arsenal from the Sand Blasting Sections of the Ordnance Shop of the Army (R.90).

The stevedoring contract, the basis upon which the Government claims recoupment from Jones (Government's Exhibit "B") provides that the contractor (Jones) shall not be responsible to the Government for, and does not agree to hold the Government harmless from, loss or damage to property or bodily injury to or death of persons:

(1) If the unseaworthiness of the vessel . . . furnished by the Government contributed jointly with the fault or negligence of the contractor in causing such damage, injury or death and the contractor . . . through the exercise of due diligence, could not otherwise have avoided such damage, injury or death;

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees, or resulted solely from proper compliance by officers, agents or employees of the contractor, with specific directions of the contracting officer (R.103).

The trial court held that the appellee Harrison be given judgment in the amount of \$2,000 against the Government on the ground that the Government was negligent and that the vessel was unseaworthy (R. 27). It also provided that a decree be entered in favor of Jones against the Government because Jones was not negligent or at fault or in any manner contributing to the injury, in whole or in part, and could not have avoided the injury by the exercise of due diligence (R. 27).

QUESTIONS PRESENTED.

1. Should this court grant a trial de novo so as to reconsider all of the evidence which is against the Government's contentions?

2. Where the evidence clearly established the fact that the vessel was unseaworthy and by the exercise of due diligence the injury to Harrison could not have been avoided, can the court grant recoupment against Jones?

3. Where the evidence clearly established that the accident was solely and proximately caused by the unseaworthiness of the vessel and the negligence of the officers of said vessel, can the court grant recoupment

against Jones, whose employee was injured while performing work at the direction of the contracting officer?

SUMMARY OF ARGUMENT.

The sole and proximate cause of the accident was the admitted unseaworthiness of the vessel, the condition being caused by oil and grease leaking from the jeeps which were stored in the wings of the shelter deck of the No. 1 hatch of the vessel SS "Private John R. Towle."

There was negligence on the part of the contracting officer in failing and omitting to provide the stevedores with abrasives of some nature, to-wit: sand or sawdust, to cover over the oil and grease when they were advised of the condition by Jones after request by Jones.

The contracting officer was further negligent in failing to provide sand, in view of the admitted fact that sand was available as shown by the testimony of the Government's witness who procured the sand shortly after hearing of the accident to Harrison.

The stevedoring contract provides that where the stevedores have used due diligence, the stevedore is not responsible to the Government by way of indemnity over or contribution, or otherwise, and further that the condition resulted solely from the unseaworthiness of the vessel and the negligence of the contracting officer, which is conclusively established by the evidence in this case.

THE ARGUMENT.

The finding of the lower court that appellee Jones was not negligent or at any fault in contributing to the injury, in whole or in part, and could not have avoided the injury by the exercise of due diligence and depriving appellant, the Government, of its right to indemnity cannot be set aside unless clearly erroneous.

1. APPELLANT NOT ENTITLED TO A TRIAL DE NOVO.

McAllister v. United States, 348 U.S. 19;

Petterson v. United States, 224 Fed.2d 748.

This court is limited in the scope of the review by the general rule, in admiralty proceedings, that the findings are not to be disturbed where they are supported by substantial evidence and are not clearly erroneous.

Kulukundis v. Strand, 202 Fed.2d 708.

2. THE VESSEL WAS UNSEAWORTHY AND APPELLANT LIABLE IN DAMAGES, BUT THE COURT CANNOT GRANT RECOUPMENT BECAUSE APPELLEE JONES EXERCISED DUE DILIGENCE PURSUANT TO THE CONTRACT.

Where the vessel is unseaworthy and where the contractor has used due diligence, the Government cannot be granted recoupment against Jones. Appellant relies principally on the cases cited in their brief, to-wit:

United States v. Arrow Stevedoring Co., 175 Fed.2d 329;

United States v. Rothschild International Stevedoring Co., 183 Fed.2d 181;

States Steamship Company v. Rothschild International Stevedoring Co., 205 Fed.2d 253;

Ryan Stevedoring Company v. Pan-Atlantic Steamship Company, 349 U.S. 901.

These cases are not applicable. The majority of these cases, decided by the Court of Appeals for the Ninth Circuit, have established that while a shipowner may be held liable for damages to an employee of an independent contractor for injury sustained because of unseaworthiness of the vessel, defect in equipment, or failure to supply a safe place to work, the shipowner is entitled to full indemnity from the contractor who, with knowledge of such unseaworthiness, defect, or failure to supply a safe place to work, permits its employee to work there *without taking proper steps to remedy such unsafe condition*. In the instant case, the vessel was admittedly unseaworthy due to the fact of the presence of oil in the wings of the shelter deck. The stevedoring contractor Jones knew of said condition and requested that the Government remedy the situation by the use of sawdust or sand or some other abrasive material. The contractor Jones did not have material available to remedy the situation due to the fact that they were working off an Army dock and did not anticipate running into such a situation and, further, could not with any dispatch have obtained the sand or sawdust, save and except for a trip to San Francisco at their terminal office and return to Benicia. The Government had the materials available on the premises and could have obtained the same within 10 or 15 minutes, as the evidence in this case shows

(by the testimony of Greening). None of the cases cited by appellant is applicable, as we have in this case a different factual situation, to-wit: the exercise of due diligence on the part of the stevedores and the failure of the Government to obtain the necessary material, to-wit: sand and sawdust, and, therefore, even though the vessel be unseaworthy, we have the further fact of the continuing negligence of the Government in failing to correct such condition. Therefore, the unseaworthiness of the vessel and the continuing negligence of the Government was the sole and proximate cause of the injury to appellee Harrison.

If it be argued by appellant, the Government, that irrespective of the terms of the written contract the appellee Jones breached its warranty and was negligent in allowing the stevedores to work, it still has the hurdle of continuing and active negligence on the part of the Government in failing to produce sand or sawdust requested by the stevedores to alleviate the existing negligent or unseaworthy conditions that the stevedores found on their arrival at hatch No. 1. If it be contended by the Government that there was joint negligence on the part of the shipowner and stevedore, then, regardless of the degree of culpability, contribution rather than indemnity would be involved and no recovery is allowed under the doctrine of *Haleyon Lines v. Haen Ship Ceiling and Refitting Corporation*, 342 U.S. 282.

In returning to the contract involved in this matter, it is contended, and rightfully so, by appellee Jones that the stevedoring company did everything in its

power to correct and remedy the unseaworthy condition found by the stevedores at the time they arrived on the job. They used "due diligence" in attempting to correct the unseaworthy condition by requesting the use and application of sand or sawdust. The stevedores had no way of knowing what condition they would run into. The Government, as the evidence showed, had the means of correcting the condition and failed and omitted to do so. This is in accordance with the decision of the lower court and in accordance with the findings of fact and conclusions of law herein and cannot be disturbed on appeal.

Appellee refers to the case of *American Mutual Insurance Company v. Matthews*, 182 Fed.2d 322, and reference is made to this case for the reason that it is illustrative of the basic differences between the right to indemnity and the right of contribution between joint tort feorsors. It is shown to the satisfaction of this court that there is no liability under the contract involved because of the due diligence on the part of the appellee Jones in attempting to remedy the unseaworthy condition which was presented to them when they commenced work on the SS "Private John R. Towle". Therefore, assuming for the moment that the appellee Jones was negligent in working the cargo, it must also be assumed that there was continuing negligence on the part of the Government in failing to provide sand and sawdust, after being requested, when the same was available. The *Matthews* case held that since the shipowner joined in the wrongdoing in supplying a defective appliance to the employing steve-

dore who used it (in this case omitting to remedy a condition when the opportunity was apparent to rectify the same), both parties were culpable, and the Government (shipowner) could obtain no indemnity. The negligent shipowner, the Government, is not entitled to a bonus or windfall for his palpable breach of duty to the stevedore. In this regard, see cases from another circuit supporting this position.

Slattery v. Mara, 186 Fed.2d 134;

Shannon v. United States, 119 Fed.Supp. 706;

Torres v. Castor, 1956 A.M.C. 325;

Hawn v. Pope and Talbot, 186 Fed.2d 800.

-
3. WHERE THE VESSEL WAS UNSEAWORTHY, AND WHERE THE GOVERNMENT FAILED TO PROVIDE NECESSARY PRECAUTIONS AND MATERIALS AFTER REQUEST BY THE STEVEDORE, THE GOVERNMENT CANNOT RECOUP ITS LOSS WHERE THE STEVEDORES WERE PERFORMING WORK AT THE DIRECTION AND REQUEST OF THE CONTRACTING OFFICER.

Again, reference is made to the contract between the Government and appellee Jones and, in particular, Clause 12(b)(2), which states as follows:

“That the contractor shall not be responsible to the Government for, and does not agree to hold the Government harmless from, . . . bodily injury . . . if the damage or injury resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents, or employees of the contractor, with specific directions of the contracting officer.”

In this regard, appellee Jones incorporates all of its argument under the preceding paragraph herein by reference thereto on the grounds that any damage or injury to appellee Harrison *resulted solely from an act or omission of the Government.*

In any event the injury to appellee Harrison resulted from proper compliance by the stevedore with order and directions made and given by the contracting officer (the Government).

(Testimony of Christian Jensen). (R. 86-87).

“Q. Now, was there anybody else there when you talked to him?

A. Yes, there was the receiving officer, or whoever he was. I don't know. I wasn't introduced to him.

Q. Was he in uniform?

A. That's right.

Q. And he was an officer, is that right?

A. That's right.

Q. You don't know his rank?

A. I don't know what rank he have?

Q. What if any conversation was had between the three of you, the walker, the officer and yourself?

A. I only had conversation with the walking boss.

Q. Was the officer there within hearing of this conversation?

A. That's right.

Q. He was right there?

A. That's right.

Q. What did you say to the walking boss in substance?

A. I asked if we couldn't get some sawdust, sand or any other substance there that you could cut the grease because we needed that or stop working.

Q. Either that or you would stop working?

A. That's right."

(Testimony of Christian Jensen). (R. 88).

"A. They decided they going to stop working.

Q. Oh, I see.

A. But then the commanding officer and the walking boss came out that the ship had to go somewheres else to load, and so on, in a hurry, and why we couldn't work carefully so the ship could get out that day and go down to another port to load the following day.

Q. Now, where did this conversation take place where the officer—Who was it that talked about the ship wanting to get unloaded and get to another port?

A. That's the walking boss.

Q. Was the commanding officer with him at that time?

A. He was standing next to him.

Q. I see, And did you tell the men—go down and tell the men what they said?

A. I went down and talked to them and asked them what their decision would be.

Q. And what was the decision?

A. The decision was that, 'We will continue.' "

It is axiomatic that where one party is requested or directed by another to do certain work, where the directing party knows of the danger or hazard involved, the directing or requesting party cannot thereafter be

heard to say that it wasn't without his fault or negligence.

CASES CITED BY APPELLANT.

Appellee Jones has reviewed most of the cases cited herein as authority by appellant and has distinguished them factually, and they are not applicable to the situation at bar. With respect to the contention of the Government that the appellee Jones was "not energetic" in securing proper implements from other sources to remedy the unseaworthy condition, it can only be stated in that regard that the vessel was moored at the Benicia Arsenal, a Government installation, and that the facts of the matter show that within 10 or 15 minutes after the accident, sand was immediately brought aboard the vessel from a Government installation on the shore adjacent to the dock. It is not a question of whether the appellee Jones was "energetic," as stated in the brief of appellant, the Government. It is a question of whether, according to the contract, appellee Jones used "due diligence". Under all the facts and circumstances, as seen by the trial court and determined therein, appellee Jones used due diligence. The cases cited therein by the Government are not in point and not controlling here.

CONCLUSION.

The correct statement of the law is that a shipowner is not entitled to claim indemnity where his negligent conduct has been the *sole* cause of the in-

jury. Here the trial court found that the Government was solely at fault in causing the condition and allowing the same to continue after being requested to remedy the same.

The shipowner should not be encouraged to neglect its duty to maintain vigilance to prevent stevedoring accidents due to unseaworthiness or defective ship's gear. By his control of the vessel and circumstances surrounding, the shipowner can eliminate unsafe conditions. The stevedore takes the ship and gear as he finds it. If the stevedore, as was the case here, objects to conditions and requests that the conditions be remedied, and the shipowner fails to do so, having within its power the facilities to remedy the situation, then there is no liability for indemnity over or recoupment against the stevedore.

Dated, San Francisco, California,
August 3, 1956.

Respectfully submitted,

JOHN H. BLACK,

EDW. R. KAY,

HENRY W. SCHALDACH,

Proctors for Appellee

Jones Stevedoring Company.

United States
COURT OF APPEALS
for the Ninth Circuit

HUGH H. EARLE, Former Collector of Internal
Revenue for the District of Oregon, Appellant

v.

ANGELA MacEVOY WOODLAW, OTIS O. JAMES
and STEPHEN W. MATTHIEU, Executors of the
Estate of G. T. Woodlaw, Deceased, Appellees

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLANT

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United States
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HUGH H. EARLE, Former Collector of Internal
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v.

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and STEPHEN W. MATTHIEU, Executors of the
Estate of G. T. Woodlaw, Deceased, Appellees

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law (R. 41-51) are unreported.

JURISDICTION

Deficiencies in income tax for 1946, 1947 and 1949 were assessed by appellant, as Collector of Internal Revenue, against appellees, as executors of the estate of

G. T. Woodlaw, deceased. (R. 4-5.) Such deficiencies were paid with interest and within two years after payment claims for refund of a portion of the sums paid for each of the above years were filed with the Commissioner of Internal Revenue on September 30, 1952. (R. 6-24.) As no action had been taken thereon after the lapse of more than six months, appellees filed this suit in the District Court of the District of Oregon on September 21, 1953, within the time provided in Section 3772 of the Internal Revenue Code of 1939. (R. 3-7, 24.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The case was tried before the District Court and judgment for appellees was entered on September 26, 1955. (R. 53.) Motion to set aside the judgment and to amend the findings of fact was duly filed by appellant and an order denying such motion but allowing additional findings of fact was entered on October 17, 1955. (Supp. R. 127-128.) Within sixty days thereafter the notice of appeal was filed on December 16, 1955. (R. 53-54.) Jurisdiction is conferred on this court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether payments made in the taxable years by the corporation here to its sole stockholder in connection with the purchase and retirement of one-half of its outstanding stock were distributions equivalent to a taxable dividend within the meaning of Section 115 (g) of the Internal Revenue Code of 1939.

STATUTE AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statute and other authorities involved are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts as found by the District Court are as follows (R. 41-51; Supp. R. 128-129):

The appellees here are the executors of the estate of G. T. Woodlaw, deceased. The latter's income tax returns for 1946, 1947 and 1949 were filed with the then Collector of Internal Revenue for the District of Oregon; and after an investigation of such returns, deficiencies were assessed in the amount of \$129,733.95 for 1946, \$3,599.26 for 1947 and \$30,080.52 for 1949. These deficiencies were paid with interest and timely claims for refund were subsequently filed on October 6, 1952. (R. 41-43.)

The Woodlaw Investment Company was organized under the laws of Oregon on April 15, 1920, and on February 6, 1946, its authorized and issued capital stock was 2,800 shares, of which all was owned by G. T. Woodlaw with the exception of qualifying shares. During 1946, Woodlaw sold 1,400 shares of this stock to the Woodlaw Investment Company¹ and in report-

¹Plaintiff's Exhibit 15 (R. 100-101) states that the purchase of this stock was authorized by the company on February 9, 1946, and that it was being acquired for retirement.

ing this sale on his 1946 return, treated the proceeds as a capital gain to the extent that such proceeds exceeded par value of the stock. (R. 44; Supp. R. 128.)

The consideration for the above sale was \$266,000, which was paid by the company to Woodlaw in the following manner: (1) cash in the amount of \$163,000 paid in 1946, in the amount of \$2,000 paid in 1947 and in the amount of \$370.90 paid in 1949, (2) settlement in 1946 of debts due from Woodlaw in the amount of \$40,225.15 and carried in an open account for the years 1930, 1931, 1932, 1939, 1940, and 1944, and (3) transfer in 1949 of a contract receivable valued at \$60,403.95. (R. 44-45, 48-49.) For items making up the sum of \$40,225.15 owed by Woodlaw, see R. 46-47, 49.

Agents of the Internal Revenue Service who examined Woodlaw's tax return for 1931 determined that amounts which were charged to his account during that year and which were included in the above sum of \$40,225.15 were not dividends.² (R. 49-50.) Also, the parties agreed at the pre-trial hearing that no part of those 1931 withdrawal charges had been included in the taxable income of Woodlaw as dividends, or otherwise, prior to the cancellation of such indebtedness by the company in 1946. (R. 34.) Other withdrawals (not

²The District Court's finding XVIII is in error in indicating that the 1931 withdrawal charges amounted to \$40,225.15, and should read as given above. That our statement is correct is shown by those accompanying the claims for refund (R. 11, 17, 23), and by the agreed facts in the pre-trial order (R. 34). The same documents also show that the District Court was in error in stating (R. 49) that the account balance of Woodlaw on December 31, 1932, was \$31,121.15. The correct figure is \$39,121.15. (R. 10, 16, 22, 33.)

involved here) were determined to be dividends and income tax was paid thereon by Woodlaw. (R. 50.)

The Woodlaw Investment Company kept its books and made its tax returns on the cash basis. It had substantial undistributed profits and its surplus account as shown on its 1946 return is as follows (R. 48):

Beginning Surplus		\$286,985.99
Profit for year 1946		35,357.15
		<hr/>
Total		\$322,343.14
Deduct Federal Income Tax Paid	\$15,294.22	
Note Receivable Cancelled	1,000.00	
Income taxes 1946 (United States)	8,339.29	
Income taxes 1946 (State of Ore.)	3,215.07	27,848.58
		<hr/>
Balance		\$294,494.56

As to the years 1929 through 1949, the tax returns of Woodlaw Investment Company showed the following (Supp. R. 128-129):

Year	Net Income	Earned Surplus and Undivided Profits	Dividends Paid
1929		\$114,013.22	
1930	\$41,023.09	151,488.33	None
1931	23,839.86	170,294.38	None reported
1932	6,505.69	173,419.29	None
1933	9,708.71	191,630.47	None
1934	1,391.51	197,595.22	None
1935	(20,721.29)	159,683.77	None
1936	(1,910.12)	158,298.32	None
1937	5,149.90	164,022.89	None
1938	(14,305.29)	144,219.14	\$5,241.60
1939	6,202.03	146,239.89	5,600.00
1940	10,330.69	156,351.97	None
1941	21,122.63	173,935.92	None

1942	26,962.84	195,495.91	None
1943	23,840.10	212,297.18	None
1944	31,867.63	239,551.18	None
1945	59,377.47	286,985.99	None
1946	35,357.15	180,048.92	None
1947	26,758.78	198,468.41	None
1948	30,730.73	222,651.98	None
1949	59,366.75	270,423.64	None

The Woodlaw Investment Company has been primarily engaged in the business of owning, leasing and renting of real estate in Portland, Oregon. (R. 48.) The District Court not only found that this company had continued in existence up to "the present time" but also found that it had continued in the same type of business. (Supp. R. 129.)

On October 12, 1945, the Woodlaw Investment Company sold its Gerlinger Building and on May 29, 1946, its Hamilton Building. It also sold some undeveloped lots in 1946. (R. 48.)

On the basis of the foregoing facts, the District Court found (R. 50):

That the transaction wherein G. T. Woodlaw, deceased, received in the year 1946, \$163,000.00 for 1400 shares of the capital stock of Woodlaw Investment Co. together with the additional sum of \$2,000.00 in the year 1947 and a real estate sales contract in the year 1949 with a balance due of \$60,403.95 with additional cash in that year in the amount of \$370.90 was not a transaction equivalent to the distribution of a taxable dividend within the meaning of Section 115(g) of the Internal Revenue Code. The net effect of the distribution to the said G. T. Woodlaw was a distribution of

The District Court further found (R. 50):

That there was in existence at the time of the transaction in 1946 involving the sale of the stock by the decedent, G. T. Woodlaw, to Woodlaw Investment Co. a legitimate business purpose therefor and Section 115(g) of the Revenue Act is inapplicable.

Upon the above findings, the District Court entered, as its conclusions of law (R. 51):

That Plaintiffs are entitled to recover from the Defendant the sum of \$153,550.92 with interest thereon at the rate of six per cent per annum from May 21, 1951, for the year 1946, and the further sum of \$1,162.67 with interest thereon at the rate of six per cent per annum from May 21, 1951, for the year 1947, and the further sum of \$31,688.38 with interest thereon at the rate of six per cent from February 5, 1951, for the year 1949 together with Plaintiffs' costs and disbursements herein incurred.

STATEMENT OF POINTS TO BE URGED

1. There is no evidence to support Finding of Fact No. XIX (R. 50) and the District Court was in error in making such finding which asserts:

That the transaction wherein G. T. Woodlaw, deceased, received in the year 1946, \$163,000.00 for 1400 shares of the capital stock of Woodlaw Investment Co. together with the additional sum of \$2,000.00 in the year 1947 and a real estate sales contract in the year 1949 with a balance due of \$60,403.95 with additional cash in that year in the amount of \$370.90 was not a transaction equivalent to the distribution of a taxable dividend within the meaning of Section 115(g) of the Internal Revenue Code. The net effect of the distribution

to the said G. T. Woodlaw was a distribution of capital assets.

2. There is no evidence to support Finding of Fact No. XX (R. 50) and the District Court erred in making such finding which asserts:

That there was in existence at the time of the transaction in 1946 involving the sale of the stock by the decedent, G. T. Woodlaw, to Woodlaw Investment Co. a legitimate business purpose therefor and Section 115(g) of the Revenue Act is inapplicable.

3. The District Court was in error in holding that the debt of \$40,225.15 owed by G. T. Woodlaw to the Woodlaw Investment Company and written off by the corporation in the transaction was not taxable³ as ordinary income to said G. T. Woodlaw at the time of the transaction.

SUMMARY OF ARGUMENT

The District Court erred in failing to hold that the payments made by a corporation to its sole stockholder in connection with the purchase and retirement of one-half of its outstanding stock were essentially equivalent to a taxable dividend, as the Commissioner determined. This question is one of fact and the decision of the District Court, being contrary to the evidence, is clearly erroneous and should be reversed.

Although the decision must depend on the circumstances of this case, there are relevant factors which

³We have omitted the "not" in the first line of Point 3 in the record (p. 126) because it is obviously an error to include it.

have been repeatedly relied on in other cases and which should be considered here as a guide in deciding the issue. These factors are: (1) a pro rata cancellation of stock and distribution of cash, (2) closely held stock, (3) a large accumulation of earnings, (4) failure to declare dividends regularly, (5) intention to continue and actual continuation in business rather than liquidation, and (6) activity undertaken for reasons personal to a stockholder rather than for the benefit of the corporation. We submit that these factors are all present here. The record shows that Woodlaw, who did not die until after 1949, owned all of the corporation's stock, both before and after the purchase and retirement of one-half of his stock; that at the time such transaction was authorized, the corporation had an earned surplus of over \$286,000, and that in 1946, 1947 and 1949 it turned over to Woodlaw \$266,000. The record shows further that dividends had been declared in only two years since 1929, but during that time Woodlaw had frequently withdrawn money from his company and part of these unpaid debts was cancelled by being applied on the consideration paid by the corporation for Woodlaw's stock. It is well established that debts of a stockholder which are cancelled by a corporation constitute ordinary income, and we submit that that rule should be applied here for Woodlaw's debts, as well as the rest of the consideration paid for his stock, constituted a taxable distribution.

Our position is strengthened by the further fact that the corporation continued in existence, even after

Woodlaw's death, and also continued its regular business throughout the taxable years. Thus, while the record shows that a minor portion of the corporation's property was sold about the time the stock was purchased from Woodlaw, such sales do not prove that this was actually a step toward liquidation, as appellees have contended. Actually, the corporation retained the most valuable portion of its property and not only gave long-term leases on two of its buildings but increased its notes and accounts receivable in the year the stock purchase was made.

Furthermore, the testimony that Woodlaw wished to liquidate his holdings does not refute our contention. Being an old man, Woodlaw doubtless wished to settle his business affairs but his conversations with friends and business associates fall far short of proving that he was actually liquidating the business of the corporation involved here. And it is particularly significant that not a single witness referred to the purchase and retirement of Woodlaw's stock by the corporation. Thus, their testimony not only fails to show why the purchase was made but does not connect such transaction in any way with Woodlaw's alleged wish to liquidate his assets. Consequently, as no other portion of the evidence proves that there was in fact a business reason for the distribution to Woodlaw it is clear that it was made for his personal benefit and should be treated as taxable dividend.

ARGUMENT

The Sums Paid by the Woodlaw Investment Company Upon the Purchase of One-Half of its Outstanding Stock from its Sole Stockholder Were Essentially Equivalent to Dividends and Should Be Taxed in the Years Received as Ordinary Income

G. T. Woodlaw, who died after the taxable years here, reported on his 1946 income tax return that stock of the Woodlaw Investment Company had been sold by him to that company at a profit of \$126,000 and that only one-half of that amount, or \$63,000, should be taken into account for income tax purposes. (For tax return, see photostatic copy of Pltfs. Ex. 4.) The District Court apparently did not adopt this view. In holding that the transaction in which Woodlaw received cash and a contract was not a transaction equivalent to a distribution of a taxable dividend, as the Commissioner determined, the court found (R. 50) that "The net effect of the distribution to the said G. T. Woodlaw was a distribution of capital assets."

Accordingly, the issue here is whether the District Court erred in failing to hold that the payments made by the Woodlaw Investment Company in 1946, 1947 and 1949 to Woodlaw, its sole stockholder,⁴ in connection with the purchase and retirement in 1946 of one-

⁴G. T. Woodlaw owned all of the stock except qualifying shares. (Supp. R. 128.) As to the qualifying shares, the record shows that one such share was held by Woodlaw's wife (R. 120), and presumably another was held by the secretary, J. M. Carson (R. 101).

half of its outstanding stock, were essentially equivalent to dividends under Section 115(g) of the 1939 Internal Revenue Code (Appendix, *infra*) and should be taxed in the years received as ordinary income. It is our position that the District Court's decision is clearly erroneous, and in so contending we shall not only point out that the court failed to consider and apply various tests which have been repeatedly approved in cases involving similar facts but shall show that the court reached a conclusion which is obviously not warranted either by its own subsidiary findings of fact or the supporting evidence in this case.

A. Applicable statutory provisions and nature of the issue here

The general rule as set forth in Section 115(a) of the 1939 Internal Revenue Code (Appendix, *infra*) is that any distribution either of money or property by a corporation to its stockholders constitutes a taxable dividend to the extent that the corporation has earnings. Code Section 115(c) (Appendix, *infra*) carves out an exception for distributions made in complete or partial liquidation of a corporation; and such distributions are treated as payments in exchange for the corporate stock although they may include earnings, but the scope of Section 115(c) is definitely limited by Section 115(g), the latter providing that—

If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to

the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

Section 115(g) was designed to prevent ordinary dividends from being disguised as liquidating dividends. See S. Rep. No. 52, 69th Cong., 1st Sess., p. 15 (1939-1 Cum. Bull. (Part 2) 332, 344) (Appendix, *infra*). Thus, it is evident that the retirement or cancellation of stock accompanying a corporate distribution should be ignored for income tax purposes if it does not serve to change the effect of the distribution as a taxable dividend to the extent of accumulated earnings and profits. See Code Section 115(b) (Appendix, *infra*).

We are, of course, aware that the question of whether a particular corporate distribution is a liquidating dividend within the meaning of Section 115(c) or is essentially equivalent to an ordinary dividend within the purview of Section 115(g) is a question of fact and depends upon the circumstances of each case. *Hirsch v. Commissioner*, 124 F. 2d 24, 28 (C.A. 9th). But the ultimate conclusion reached by the trial court on such question should be reversed when it is clearly erroneous, as we believe it is in this case. *United States v. Gypsum Co.*, 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869; *Commissioner v. Roberts*, 203 F. 2d 304 (C.A. 4th); *Chandler's Estate v. Commissioner*, 228 F. 2d 909 (C.A. 6th).

Moreover, notwithstanding the characterization of the question here as one of fact, there are certain fac-

tors which are relevant in distinguishing between a cancellation or retirement of stock which constitutes the essential equivalence of a taxable dividend under Section 115 (g) and the cancellation or retirement of stock which constitutes a partial liquidation under Section 115 (c). Accordingly, we shall discuss these factors before referring to the facts in this case.

B. Factors which have been held to be determinative of the issue here

As pointed out in *Woodworth v. Commissioner*, 218 F. 2d 719 (C.A. 6th), the views of some of the courts as to what tests should be controlling in deciding the issue here have changed⁵ and it now appears to be the consensus that no single factor may be considered as decisive of such issue. But even with the varying views that have been expressed by the courts over the years, there are certain factors which have been repeatedly relied on in holding that a distribution is essentially equivalent to a taxable dividend. This being so, we think it is necessary that such factors should be considered here.

⁵Among the cases cited as announcing views not now adhered to are *Patty v. Helvering*, 98 F. 2d 717 (C.A. 2d), and *Commissioner v. Cordingley*, 78 F. 2d 118 (C.A. 1st), holding that when the issuance of shares is bona fide, subsequent redemption thereof cannot be treated as equivalent to a taxable dividend; and *Commissioner v. Champion*, 78 F. 2d 513 (C.A. 6th), and *Allen v. Commissioner*, 41 B.T.A. 206, holding that a legitimate business reason for cancellation of stock is sufficient to prevent the application of Section 115 (g). Views which have been abandoned are also discussed in *Kirschenbaum v. Commissioner*, 155 F. 2d 23 (C.A. 2d) certiorari denied, 329 U.S. 726, and in 1 Mertens, *Law of Federal Income Taxation* (1955 Cum. Pocket Supp.), Sec. 9.123.

The factor which appears to have been most frequently mentioned and given greatest weight is a pro rata cancellation of stock and distribution of cash to the stockholders. Obviously, the reason for this is that a pro rata cancellation and distribution does not change the essential relation of the stockholders to the corporation. In other words, the cancellation of the stock is usually a mere formality and a stockholder's proportionate interest in and control over the corporation remains the same after such action as before. See *Chandler's Estate v. Commissioner*, *supra*, affirming *per curiam* 22 T.C. 1158; *Commissioner v. Roberts*, *supra*; *Flanagan v. Helvering*, 116 F. 2d 937 (C.A.D.C.); *Vesper Co. v. Commissioner*, 131 F. 2d 200 (C.A. 8th); *Stein v. United States*, 62 F. Supp. 568 (C. Cls.).

The importance of a pro rata cancellation has long been recognized in the Treasury Regulations. In regard to this, Section 29.115-9 of Regulations 111 (Appendix, *infra*) states, after pointing out that the question involved here is one of fact, that—

*A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. * * * (Italics supplied.)*

All of the Regulations have contained this identical language since 1929.⁶ Also, since then the identical language of Section 115 (g) involved here has been repeatedly reenacted. As the Regulations are clearly a reasonable interpretation of subsection (g) they must be deemed to have received the implied approval of Congress and should be given the force and effect of law. *Helvering v. Winmill*, 305 U.S. 79. Consequently we believe that a pro rata cancellation of stock is the most important single factor tending to show essential equivalence to a taxable dividend, and, as we shall point out below, that factor was present here.

Other factors which have been considered and relied on by the courts include (1) closely held corporate stock,⁷ (2) large earnings and unnecessary accumulation of cash,⁸ (3) failure to declare dividends regularly,⁹ (4) intention to continue and actual continuation of business rather than liquidation of the business,¹⁰

⁶See Section 19.115-9 of Regulations 103 (1940 ed.); Article 115-9 of Regulations 101 (1939 ed.), Regulations 94 (1936 ed.), and Regulations 86 (1935 ed.); and Article 629 of Regulations 77 (1933 ed.) and Regulations 74 (1929 ed.).

⁷*Chandler's Estate v. Commissioner*, *supra*; *Commissioner v. Roberts*, *supra*; *Bazley v. Commissioner*, 155 F. 2d 237, 239 (C.A. 3d), affirmed, 331 U.S. 737.

⁸*Hirsch v. Commissioner*, *supra*; *McGuire v. Commissioner*, 84 F. 2d 431 (C.A. 7th), certiorari denied, 299 U.S. 591; *Goldstein v. Commissioner*, 113 F. 2d 363 (C.A. 7th); *Hill v. Commissioner*, 66 F. 2d 45 (C.A. 4th); *Flanagan v. Helvering*, *supra*.

⁹*Hirsch v. Commissioner*, *supra*; *Boyle v. Commissioner*, 187 F. 2d 557 (C.A. 3d), certiorari denied, 342 U.S. 817; *Goldstein v. Commissioner*, *supra*; *Brown v. Commissioner*, 79 F. 2d 73 (C.A. 3d).

¹⁰*Rheinstrom v. Conner*, 125 F. 2d 790, 793 (C.A. 6th), certiorari denied, 317 U.S. 654; *McGuire v. Commissioner*, *supra*;

(5) purchase and retirement of stock not for the purpose of aiding the corporation but for reasons beneficial and personal to the taxpayer-stockholder,¹¹ and (6) facts showing that the net effect of a purchase and retirement of stock is to distribute corporate earnings just as if a cash dividend had been declared and paid.¹²

C. Facts showing that the ultimate conclusion of the District Court is clearly erroneous

The record shows that at a special joint meeting of stockholders and directors of the Woodlaw Investment Company held February 9, 1946, the three persons present passed a resolution authorizing the purchase and retirement of 1,400 shares of that company's capital stock. (Pltfs. Ex. 15; R. 100-101.) At that time there were 2,800 shares of stock outstanding, and with the exception of qualifying shares, all of the shares were owned by G. T. Woodlaw. (R. 44, 100; Supp. R. 128.) The 1,400 shares which were allegedly purchased¹³

Commissioner v. Straub, 76 F. 2d 388 (C.A. 3d); *Vesper Co. v. Commissioner*, *supra*.

¹¹*Smith v. United States*, 121 F. 2d 692 (C.A. 3d); *Bazley v. Commissioner*, 155 F. 2d 237 (C.A. 3d), affirmed, 331 U.S. 737; cf. *Commissioner v. Snite*, 177 F. 2d 819 (C.A. 7th).

¹²*Bazley v. Commissioner*, 331 U.S. 737; *Kirschenbaum v. Commissioner*, 155 F. 2d 23 (C.A. 2d), certiorari denied, 329 U.S. 726; cf. *Commissioner v. Estate of Bedford*, 325 U.S. 283. See also *Smith v. United States*, 121 F. 2d 692 (C.A. 3d); *Hirsch v. Commissioner*, *supra*; *Flanagan v. Helvering*, 116 F. 2d 937 (C.A.D.C.); *Hyman v. Helvering*, 71 F. 2d 342 (C.A.D.C.), certiorari denied, 293 U.S. 570.

¹³We refer to the 1946 transaction as an alleged purchase and retirement because it is doubtful if the transaction was one which could be, or ever was, legally recognized, and this appears to be the view of the appellees, one of whom was Woodlaw's attorney. As to the latter's views, see Exhibit A accompanying each claim for refund and stating that "Action of the corporation in the pur-

and retired by the company were sold by Woodlaw, and after that transaction, the latter still owned all of the outstanding stock except qualifying shares. From these facts, it is, of course, obvious that the distribution made to Woodlaw and the retirement of his stock was necessarily pro rata and it is equally obvious that the stock was closely held. Thus, it must be admitted that the first two factors listed above are present here and are strongly supportive of our position here. The importance of such factors was pointed out in *Commissioner v. Roberts*, 203 F. 2d 304 (C.A. 4th), when the Court in considering facts similar to those here said (p. 306):

The vital thing here, as we see it, is that, by the redemption of this stock, the *essential relation* of the taxpayer to the corporation was not, in any practical aspect, changed. Before the redemption, he was the sole stockholder in the corporation; after the redemption, he was still the sole stockholder. Of what real consequence was it that before the redemption his sole ownership was divided into 2,000 shares, and after the redemption, this same sole ownership was divided into 1,500 shares: He owned the whole corporation before the redemption; after the redemption, he was still the sole owner.

Thus, although the Fourth Circuit recognized in the *Roberts* case, *supra*, that the issue there, which was the same as in the instant case, was usually considered one of fact, it held that the Tax Court had erred in failing

chase of its stock standing in the name of G. T. Woodlaw was not authorized by its Articles of Incorporation and Bylaws and was, therefore, *ultra vires*." (R. 12, 18, 24.) If that view is correct, it strengthens our position that the distributions were in fact earnings and must be treated as taxable dividends.

to hold that the distribution to the stockholders in that case was essentially equivalent to a taxable dividend under Section 115 (g). Consequently, it reversed the Tax Court's decision. We submit that the Fourth Circuit's statement is equally applicable here. Woodlaw's relationship to his company and his control over it were exactly the same after the sale as before, and there was no change in the company's business. In other words, the company's business, which was owning and leasing real estate (R. 48), was still carried on as before and was all transacted for the benefit of Woodlaw. Certainly such facts are significant, but they were not considered important by the District Court.

The next two factors listed under Subheading B above are also present here. These are a large accumulation of corporate earnings and a failure to declare dividends regularly. The income tax returns of the Woodlaw Investment Company show (Supp. R. 128-129) that for 21 years (i.e. from 1929 through 1949) the company had a large amount of earned surplus and undivided profits. In fact, at no time was such amount less than \$114,013.22 (amount for 1929) and in 18 of the years covered by the returns, the earned surplus and undivided profits not only exceeded \$150,000 but in most of those years it was considerably larger than that figure. The highest amount (\$286,985.99) was reported for 1945 and that was also the beginning surplus for 1946. (R. 48.) We think that fact is significant since the resolution for the purchase and retirement of stock was passed very early in that year (i.e. on February 9). (R. 100.)

The significance of such resolution is still more clearly seen when we contrast the large accumulation of earnings with the very small amount of dividends declared in the years referred to. No reason is given in the record for the failure to declare regular dividends but we know that, as sole stockholder and president of the Woodlaw Investment Company, Woodlaw could, of course, have paid dividends at any time. Nevertheless, dividends were actually paid in only two of the 21 years covered by the record, and then the total for those two years (1938 and 1939) was only \$10,841.60. In another year (1931), none was reported but the record shows (R. 50) that Internal Revenue Agents required Woodlaw to treat some of his withdrawals from the company in that year as a taxable dividend.

In this connection it should be noted that although Woodlaw was obviously unwilling to have dividends declared, he had no hesitancy in borrowing money from his company from time to time and in letting such debts run without payment for years. The record does not give the total amount of these loans but it does show that from 1930 through 1944 some of his withdrawals amounted to \$40,225.15 and that sum was treated as a part of the price that the company agreed to pay for Woodlaw's stock. (R. 45-50.) Appellees contended in the District Court, without giving a definite reason, that such cancellation was not "a distribution equivalent to a dividend in any event" (R. 36), and from the ultimate decision reached by the District Court, we presume that it agreed. However, the Court

did not make a statement to that effect and we are in doubt as to its view because it not only made a separate finding (No. XXI) as to these debts which were treated as a part of the purchase price but stated therein that "part of the income attributable to the taxpayer arose out of the write-off of \$40,225.15 shown due on the books of Woodlaw Investment Co. from decedent, G. T. Woodlaw". (R. 50-51.) From this finding it is evident that the District Court should have held that the amount of this debt was taxable income.

As this Court pointed out in *Hirsch v. Commissioner*, 124 F. 2d 24, 29, it is an established principle of tax law that if a person borrows money from a corporation in which he owns stock and his debt is subsequently cancelled, income accrues to him at the time of the cancellation and such income must be treated as a taxable dividend. To same effect, see also *Wiese v. Commissioner*, 93 F. 2d 921, 922 (C.A. 8th), and *Allen v. Commissioner*, 117 F. 2d 364, 368 (C.A. 1st). We submit that the above principle should have been applied here to Woodlaw's debts which were cancelled. While they were allegedly cancelled in connection with a purchase of his stock, the purchase was merely a device for distributing earnings and the entire amount of these debts, as well as the rest of the consideration for the alleged purchase, should have been treated as a distribution of earnings.

It is our further contention that the remaining factors listed under Subheading B are also present here, i.e. the continuation of the corporation in business and

the retirement of corporate stock for reasons beneficial to a stockholder, who, in this case, owned all of the corporation's stock both before and after such transaction. The facts which determine the issue are: In December, 1945, the corporation had earned surplus and undivided profits of over \$286,000. (Supp. R. 129.) In 1946, 1947 and 1949 it turned over to its sole stockholder \$266,000. Woodlaw did not die until after 1949 (R. 39) and the corporation continued in existence in the same type of business up to at least October, 1955 (Supp. R. 129) which was nearly nine years from the date of the alleged proposed liquidation. The record is devoid of any evidence of a business purpose for the retirement of the corporation's stock and, as we shall point out more fully below, it did not help the corporation in any way.

Even if Woodlaw did plan, either in his capacity as sole stockholder or as president and general manager of the Woodlaw Investment Company, to liquidate his company at some unknown future date (and as we shall show that is all the evidence indicates even when interpreted most favorably to appellees) it is not what Woodlaw thought he might do in the future but actually what was done at the time of the alleged purchase that is important in determining the issue here. This was forcefully brought out by this Court some years ago in *Hirsch v. Commissioner, supra*, when, in discussing Section 115 (g), it approved the statement in *Smith v. United States*, 121 F. 2d 692 (C.A. 3d) that (p. 29):

The statute is aimed at the result. The basic criterion for the application of Section 115(g) is 'the net effect of the distribution rather than the motives and plans of the taxpayer or his corporation.' *Flanagan v. Helvering* [73 App. D.C. 46], 116 F. 2d 937, 939, 940.

For other cases reaching the same conclusion as to Section 115(g), see *Boyle v. Commissioner*, 187 F. 2d 557 (C.A. 3rd), certiorari denied, 342 U.S. 817; *Jones v. Dawson*, 148 F. 2d 87 (C.A. 10th); *Rheinstrom v. Conner*, 125 F. 2d 790 (C.A. 6th), certiorari denied, 317 U.S. 654; and *Hyman v. Helvering*, 71 F. 2d 342 (App. D.C.), certiorari denied, 293 U.S. 570.

We submit that if this Court's interpretation of Section 115(g) is applied here, it is clear that the District Court's decision is erroneous for the alleged purchase was not in fact a step toward liquidation but was merely a distribution of a portion of the company's large accumulation of earnings, and should be treated as equivalent to a taxable dividend.

D. Erroneous basis for District Court's decision

The basis for the District Court's decision here is a matter about which we should not have to conjecture but it will be seen that neither in its findings of fact (R. 41-51; Supp. R. 128-129) nor conclusions of law (R. 51) does the District Court indicate specifically the reason for allowing the claimed refunds. However, it seems advisable to discuss what appears to be the basis for its decision in view of what the appellees contended below and doubtless will contend in this Court.

We assume that the primary basis, if not the only basis, for the District Court's decision is found in its Finding XX (R. 50) which states:

That there was in existence at the time of the transaction in 1946 involving the sale of the stock by the decedent, G. T. Woodlaw, to Woodlaw Investment Co. a legitimate business purpose therefor and Section 115(g) of the Revenue Act is inapplicable.

Thus, it appears that the District Court refused to apply Section 115(g) here because of the existence of a "legitimate business purpose" for the sale but it did not explain what the business purpose was and its nature cannot be determined from its findings. However, from the contention of the appellees below (R. 36) we assume that the District Court may have referred to an alleged intention on the part of Woodlaw to liquidate his company. If this is correct, we assert that such intention is not conclusively proved by the evidence, nor does the evidence show that the purchase and subsequent payment to Woodlaw was made to carry out either a partial or total liquidation of his company.

The record shows that the consideration for the alleged purchase of Woodlaw's stock was paid to him pursuant to a resolution which was passed by the stockholders and directors of the Woodlaw Investment Company on February 9, 1946, and which stated merely that 1,400 shares of that company's stock was to be purchased and that Woodlaw was instructed to make the purchase. See Pltfs. Ex. 15. (R. 100-101.) From this it is apparent that the resolution contained no hint

of any plan to liquidate nor any reason whatsoever for the purchase. But if there was "a legitimate business purpose" for the purchase of such stock, it would seem that such purpose would have been stated in the resolution. Certainly it is customary when a serious step like liquidation is planned for a corporation to indicate this in its minutes but the company here did not do so. But actions of a corporation are even more important than its statements as to a proposed liquidation. Indeed, corporate intent to liquidate can best be determined "by the acts and doings of the corporation" for liquidation is a "condition brought about by affirmative action, the normal and necessary result of which is winding up the corporation". *Beretta v. Commissioner*, 141 F. 2d 452, 454 (C.A. 5th).

Obviously, no "acts and doings" of the corporation here brought about liquidation for the District Court found that the company continued to exist and was carrying on the same type of business up to "the present time". (Supp. R. 129.) Furthermore, there is no evidence that the company intended to liquidate when the purchase of stock was authorized on February 9, 1946, or that there was any other business reason for such action. Thus, the District Court's finding (R. 50) that there was *then in existence* a legitimate business purpose for such transaction is not supported by the record. But it was, of course, known by Woodlaw that his company had the largest accumulation of earnings (i.e. \$286,985.99) it had had since 1929 and that no dividend had been paid since 1939 (Supp. R. 129),

and we submit that it was this large accumulation which was the primary reason for the action taken.

But in arguing otherwise, appellees will undoubtedly point to certain sales of property that were made by the company and to the testimony of the witnesses relative to an alleged intention to liquidate. As to the sales, the District Court found (R. 48) that the company sold the Gerlinger Building on October 12, 1945, the Hamilton Building on May 29, 1946, and some undeveloped city lots also in 1946 but no dates were given for the latter sales.¹⁴ No reason is given by the District Court for these sales but Matthieu, one of the appellees and also attorney for Woodlaw, testified (R. 105) that the latter formulated a plan to liquidate all of the assets of his company in December, 1945. However, the record shows nothing to indicate that any affirmative action had been taken by the company toward the alleged liquidation on February 9, 1946. Furthermore, there is no evidence of any actual steps being taken thereafter toward winding up the company's business.

On the other hand, there is substantial evidence to support the District Court's finding (Supp. R. 129) that the company continued in existence and carried on its same type of business. This evidence shows (R. 105-106) that the company retained four pieces of property after the sales referred to above and three of

¹⁴From the testimony of Matthieu, it appears that one lot was sold in February and the other lots were sold in April of 1946. (R. 104.)

these pieces made up one-half of a city block. It is obvious that the property which the company retained made up the bulk of its assets and was much more valuable than the pieces which it sold. Indeed, Woodlaw priced the half block at a million dollars when he made an unsuccessful attempt to sell the property in the fall of 1947 (R. 68-69) and although his price may have been excessive, we know that the property was valuable. This is shown by the company's income tax return for 1946 which shows that at the beginning of that year the company had assets of \$546,781.80 and that at the end of the year it still had assets of \$511,641.11; and these figures are the values given after a generous allowance for depreciation. (See photostatic copy of Deft. Ex. 9.)

As we have already indicated, the company carried on its regular business during all of the taxable years involved here and afterwards up to the time of the hearing in this case. Among these activities was the leasing of two of its buildings. One of these, the Fourth Avenue Hotel, was leased in 1946 to Morris Rogoway and this lease was still in effect at the time of trial. (R. 67.) The other building, the Circle Theater, was rented in May, 1947, to Theodore R. Gamble under a long-term lease. (R. 108.) Thus, the company's regular activities were carried on and its revenues continued to come in as in previous years.

Moreover, the company's 1946 return indicated that there were still other transactions. We know this because its notes and accounts receivable were increased

from \$85,726.35 at the beginning of 1946 to \$106,786.82 at the end of the year. Also, under a subdivision of the return entitled "Bonds, Notes and Mortgages payable" we find a liability listed at the end of 1946 in the amount of \$146,774.85. As no explanation is given, we do not know why the company incurred such a liability but we may properly infer that it was the result of some business activity in that year, or to obtain cash to distribute to Woodlaw.

Accordingly, we contend that the foregoing facts relative to the company's activities refute the contention of the appellees that the Woodlaw Investment Company had undertaken either a partial or total liquidation of its business. Furthermore, appellees' contention is not proved by the testimony here that Woodlaw wished to liquidate his holdings. Obviously, there is a difference between the desire to settle one's business affairs by liquidation at some future time and actually taking steps to do so; and when the testimony here is analyzed it will be seen that it shows merely that Woodlaw had told some of his friends and business associates that he was old and thought he should settle his affairs by liquidating his assets. However, some of the witnesses were not sure as to the year when they talked to Woodlaw, others did not know whether he referred to property he held personally or to property held by the Woodlaw Investment Company and some indicated that the conversations had touched on the matter of liquidation only in a very general way. (R. 59-60, 62-63, 68-69, 71-72, 76-77.)

Even Matthieu, who testified about the sales of property referred to above, did not indicate any other specific action which was taken by the Woodlaw Investment Company and we submit that under the circumstances here such sales do not prove an intent to liquidate its business. Moreover, the record shows that the company retained the bulk of the property and carried on its regular business, including the execution of two long-term leases after the retirement of Woodlaw's stock. (R. 105-108.)

But the most significant thing to notice here is that neither Matthieu nor Woodlaw's wife nor any of the other witnesses referred to the purchase of Woodlaw's stock by his company or gave any indication that it had ever been discussed with them. Consequently, there is nothing in any of the testimony that connects such purchase and the distribution of cash and property to Woodlaw with the latter's intention to liquidate his holdings.

In this connection, it should be noted that after Matthieu indicated that Woodlaw had formulated a plan to liquidate his assets, he was asked what was actually done in furtherance of Woodlaw's plan and he replied that a vacant lot was sold in February, of 1946, some others in April of the same year, and the Hamilton Building in May, also of that year. (R. 103-104.) Thus, it is apparent that Woodlaw's attorney (who is also one of the appellees here) did not consider the purchase of Woodlaw's stock as a part of the alleged plan, and neither do we. Of course, we do not admit

that these sales of a minor portion of the company's property indicated that the company had actually started to liquidate its business but even if it should be held that it does, there is nothing in the record here to connect such sales with the purchase and retirement of Woodlaw's stock. That was done, as we have already pointed out, merely as a way of distributing some of the large accumulation of earnings.

CONCLUSION

The decision of the District Court is clearly erroneous and should be reversed.

Respectfully submitted,

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July, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) [as amended by Secs. 166 and 186(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Dividend.*—The term “dividend” when used in this chapter (except in section 201 (c)(5), section 204 (c)(11) and section 207 (a)(2) and (b)(3) (where the reference is to dividends of insurance companies paid to policy holders)) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. * * *

(b) *Source of Distributions.*—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.
* * *

(c) [as amended by Sec. 147 of the Revenue Act of 1942, *supra*] *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts

distributed (whether before January 1, 1939, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. * * *

* * * * *

(g) *Redemption of Stock.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

(i) *Definition of Partial Liquidation.*—As used in this section the term “amounts distributed in partial liquidation” means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * * *

(26 U.S.C. 1952 ed., Sec. 115.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.115-9. *Distribution in Redemption or Cancellation or Stock Taxable as a Dividend.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the dis-

tribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. A bona fide distribution in complete cancellation or redemption of all of the stock of a corporation, or one of a series of bona fide distributions in complete cancellation or redemption of all of the stock of a corporation, is not essentially equivalent to the distribution of a taxable dividend. If a distribution is made pursuant to a corporate resolution reciting that the distribution is made in liquidation of the corporation, and the corporation is completely liquidated and dissolved within one year after the distribution, the distribution will not be considered essentially equivalent to the distribution of a taxable dividend; in all other cases the facts and circumstances should be reported to the Commissioner for his determination whether the distribution, or any part thereof, is essentially equivalent to the distribution of a taxable dividend.

S. Rep. No. 52, 69th Cong., 1st Sess., p. 15 (1939-1 Cum. Bull. (Part 2) 332, 344):

Partial Liquidation.

Section 201(g): It has been contended that under existing law a corporation, especially one which has only a few stockholders, might, without resorting to the device of a stock dividend, be able to make a distribution to its stockholders which would have the same effect as a taxable dividend. For example: Assume that two men hold practically all the stock in a corporation, for which each had paid \$50,000 in cash, and the corporation had accumulated a surplus of \$50,000 above its cash capital. It is claimed that under existing law the corporation could buy from the stockholders, for cash, one-half of the stock held by them and cancel it without making the stockholders subject to any tax. Yet this action, in all essentials, would be the equivalent of a distribution through cash dividends of the earned surplus. The subdivision as rewritten by the House bill is intended to make clear that such a transaction is taxable and the committee approves the provision, which obviously does not apply in cases of complete liquidation of all the stock of the corporation.

The House bill provided that the amendment should be retroactive to January 1, 1925. The committee recommends that the provisions of the 1924 Act in this respect remain in effect during the calendar year 1925 and that the change in the law should become effective only as of January 1, 1926.

United States
COURT OF APPEALS

for the Ninth Circuit

HUGH H. EARLE, Former Collector of Internal Revenue for the District of Oregon,

Appellant,

v.

ANGELA MACEVOY, WOODLAW, OTIS O. JAMES
and STEPHEN W. MATTHIEU, Executors of the
Estate of G. T. Woodlaw, Deceased,

Appellees.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

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FILE

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APPELLEES' BRIEF

SUMMARY OF ARGUMENT

Appellant presents an argument which would more properly be addressed to the District Court. The sole issue here presented is whether the factual determination by the Court below is clearly erroneous.

The testimony establishes that the decedent, a man 80 years of age, conceived a plan of liquidation of the corporation shortly after the death of the adopted son whom he expected to succeed him. The reason for the

liquidation was that he was getting too old to run the business.

In pursuance of his plan of liquidation, the decedent, who actively and personally managed his own affairs and those of the corporation, caused the corporation to sell some and attempt to sell all the rest of its capital assets, consisting of downtown buildings and unimproved lots. Those which he did not succeed in selling were a half-block of downtown property for which he was asking \$1,000,000. In an effort to make that property more attractive to purchasers, he had established good tenants in two of the three buildings, instead of operating them through the Woodlaw Investment Co. or another corporation. This other corporation, in which he was the sole stockholder, had operated one of the buildings, and was sold to the new lessees.

The distribution which is here involved was made in pursuance of that plan of liquidation, in order to reduce the capital of the corporation as called for by its contracted activities. It served no individual purpose of Colonel Woodlaw, other than his desire to liquidate his holdings because of his age. In fact, it caused the imposition of a tax which would not otherwise have been incurred. The distribution falls clearly within the definition of a distribution in partial liquidation (I.R.C. 1939, § 115(i)) and was not essentially equivalent to the distribution of a taxable dividend. It was made for legitimate business purposes of the corporation, and as part of a plan of complete liquidation which was undertaken and partially consummated.

The cases cited by the appellant do not support his position in that not one of them involves a reversal of the factual determination of the trial court. The authorities demonstrate that the trial court herein was justified in its holding that the distribution herein was not essentially equivalent to a dividend, and the judgment of the court below should be affirmed, because not clearly erroneous.

ARGUMENT

The Issue Presented by This Appeal

Although paying lip-service to the rules regarding appellate review, the Brief of appellant Earle evidences a rather basic misconception of the issue before this Court. He presents a purely factual argument, depending in part upon inferences and guesses from the oral testimony which he desires to draw, but which the District Court did not, in an attempt to convince this Court that the purchase and retirement of its stock by Woodlaw Investment Co. was a transaction essentially equivalent to the distribution of a taxable dividend.

Whether or not the transaction was such a dividend was the sole issue of fact presented to the District Court for determination (R. 34-35). After consideration of the testimony and the documentary evidence, the District Court came to the factual conclusion that the transaction was not equivalent to the distribution of a taxable dividend, but that its net effect was a distribution of capital assets. The only issue before this Court is

whether or not this factual determination by the District Court was "clearly erroneous."

The scope of appellate review in such circumstances has been frequently stated by this Court. Thus, in *Earle v. W. J. Jones & Son*, 200 F2d 846, 847 (CA 9, 1952), the Court stated:

"The finding of fact that the advances were loans must be sustained unless clearly erroneous. Contrary to contentions of appellants, the oral testimony in this case is not in conflict with the documentary evidence so as to render the testimony extremely doubtful and thus permit us to disregard the finding and draw our own inferences from the record. The oral testimony was substantially consistent with the undisputed facts, and we must apply it with "due regard * * * to the opportunity of the trial court to judge of the credibility of the witnesses." And we should be reluctant to disturb the finding of the trial court where, as here, the question whether the advances gave rise to debts or to a proprietary interest depends upon the determinative intent of the parties to the critical advances. 'Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.' "

In *Toor v. Westover*, 200 F2d 713, 717 (CA 9, 1952), the Court held:

"We are unable to say that the particular findings of the District Court which we have thought to be crucial in this case are clearly erroneous because, upon an examination of the entire evidence, we are not left with a 'definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum*, 1948, 33 U. S. 364, 68 S. Ct. 525, 542, 92 L. Ed. 746: see

Grace Bros., Inc., v. Commissioner, 9 Cir., 1949, 173 F2d 170, 173-174.”

As appellant recognizes, the question presented by this appeal is one of fact (Appellant's Br., p. 13). We therefore set forth a statement of the evidence before the District Court on which it relied in reaching its conclusion, most of which testimony the appellant has ignored in presenting his argument.

Statement of Facts

G. T. Woodlaw was substantially the sole stockholder of Woodlaw Investment Co. (Supp. R., 128). In 1946, he was a man of 80 years of age. (R. 59, 82). Aside from his wife, the only relative close to him was Graham Casteel Woodlaw, (R. 81, 119) a grandson whom he had adopted as a son. (R. 79, 116)

Colonel Woodlaw actively and personally managed the affairs of the Woodlaw Investment Co., (R. 59, 64, 110) which was engaged in the owning and operating of real estate in the City of Portland, Oregon. (R. 32) It was his hope that his son would some day assist him in the management of the business. (R. 105, 112) Unfortunately, the son was killed in an airplane crash while in military service in November, 1945. (R. 79) The death of his son was a “crushing blow” to Colonel Woodlaw. (R. 80, 116) In the latter part of 1945 he had cancelled existing plans for expansion of the business, (R. 76) and about the month of December, 1945, (R. 105) as a result of the death of his son, (R. 112) he formulated a plan of liquidating the business. (R. 115)

At about the time of the son's death, the Woodlaw Investment Co. owned a parcel of real estate known as the Hamilton Building, (R. 84) a parcel known as the Gerlinger Building, (R. 92) some unimproved lots, (R. 103-104) and a half block of downtown Portland property consisting of three distinct buildings—the Fourth Avenue Hotel Building, the Circle Theater Building, and the Maguire Building. (R. 106) Circle Theater Building was leased by the Circle Theater Company, a corporation substantially owned by Colonel Woodlaw. (R. 107)

In October, 1945, (R. 104) the Woodlaw Investment Company sold the Gerlinger Building, (Exh. 12, R. 98)* for a price that does not appear in the record. Colonel Woodlaw had already decided at that time to contract his activities. (R. 70) In May of 1946, (Exh. 11, R. 96) pursuant to the plan of liquidation, the Hamilton Building was sold on contract for \$80,000. (R. 103-104) In February of 1946, the corporation sold the Failing Street lots for about \$2200, (R. 103, 104) and in April, 1946, (R. 103, 104) some other unimproved lots were sold for \$9,000, also in furtherance of the liquidation plan.

In 1946 the corporation leased the Fourth Avenue Hotel Building to Morris Rogoway. (R. 67) In 1947, Colonel Woodlaw sold the stock in the Circle Theater Company to Theodore R. Gamble, who had been at-

* According to the testimony of witness Matthieu (R., 104) and the agreed facts (R., 33), the Gerlinger Building was sold in October, 1945, before the death of Colonel Woodlaw's son. The corporate resolution, however, indicates that the transaction was not approved by the Board of Directors until January 25, 1946 (R. 98-99).

tempting to work out a deal with him in regard to this property since 1940. (R. 56) He explained to Gamble that after all the years of discussing the deal, he was finally ready to go through with the transaction because he was liquidating all his assets and had taken substantial action in that direction. (R. 59-60) At the time of this sale, a long-term lease was entered into between the new owners of the Circle Theater Company and the Woodlaw Investment Company. Colonel Woodlaw explained that he did this in order to establish good tenants in the property so as to make it attractive to buyers. (R., 108)

During the year 1947 Colonel Woodlaw attempted to make a sale of the half-block comprising three buildings to Morris Rogoway for \$1,000,000. (R., 68-69) In 1948 he also attempted to sell the half-block to Harry A. Caraplis for the same price. (R., 72-73, 114, 117-118) No deal was ever consummated, and Colonel Woodlaw continued in his efforts to liquidate this property until the time of his death (R. 77, 119) in 1950. (R., 28) The only other corporate property was a couple of lots on 25th or 26th and Marshall. (R., 106) Colonel Woodlaw discussed giving these lots to Shriner's Hospital, but apparently nothing was ever done with respect to it. (R., 64)

Thus, it appears that of five major parcels of real estate, and three sets of minor parcels of unimproved realty, the Woodlaw Investment Company sold two of the three unimproved sets, sold two of the five major parcels, leased two of the remaining three parcels, one

of them being a long-term lease "to establish good tenants in property that would make it attractive to a buyer or buyers," and entered into negotiations with at least two different prospective purchasers for the sale of the three remaining parcels for \$1,000,000. All of these transactions were clearly identified as being undertaken pursuant to the plan of liquidation of the assets of the corporation which had been adopted. (R. 59-60, 68-69, 72, 76-77, 103-104, 117)

On February 5, 1946, the corporation adopted a resolution that the authorized capital stock of the corporation be reduced from 3500 shares to the 2800 shares outstanding. (R. 99-100) On February 9, 1946, a resolution was adopted that the corporation purchase from Colonel Woodlaw 1400 shares of stock and retire them. (R. 100-101) The consideration for this purchase was \$226,000, which was paid by a cancellation of debts owed to the corporation by Col. Woodlaw of \$40,225.15 and a cash payment of \$163,000 in the year 1946, a cash payment of \$2000 in 1947, and the balance in 1949 by the transfer to Colonel Woodlaw of the corporation's equity in the contract for the sale of the Hamilton Building. (R. 29, 33)

On the basis of the foregoing facts, the District Court found as a fact that the transaction by which the corporation purchased the stock from Colonel Woodlaw "was not a transaction equivalent to the distribution of a taxable dividend within the meaning of Section 115(g) of the Internal Revenue Code. The net effect of the distribution to the said G. T. Woodlaw was a

distribution of capital assets.” (R., 50) The Court also found (R., 50):

“That there was in existence at the time of the transaction in 1946 involving the sale of the stock by the decedent, G. T. Woodlaw, to Woodlaw Investment Co. a legitimate business purpose therefor and Section 115(g) of the Revenue Act is inapplicable.”

The Facts Support the District Court’s Judgment

Appellant complains that it “should not have to conjecture” about the basis for the District Court’s decision, but that the Court fails to indicate the reason for allowing the claimed refunds. (Appellant’s Br., p. 23) In view of the fact that appellant stipulated in the pre-trial order that the sole issue of fact to be determined was the equivalence of the transaction to a taxable dividend, (R. 34) and that he requested no additional findings about the points on which he now conjectures, appellant is in a poor position to complain. Since he argues that “the statute is aimed at the result,” and that the basic criterion is “the net effect of the distribution,” (Appellant’s Br., p. 23) it is a trifle difficult to determine what fault he finds with a factual finding that the net effect of the transaction was a distribution of capital assets. (R. 50)

Nevertheless, on the foregoing statement of facts, we feel that the trial judge was well justified in concluding that Col. Woodlaw was a man advanced in years, who had expected his son to step into the business and take it over upon his return from service. When the

son died, it became apparent that there would be no replacement for Col. Woodlaw, who was the active manager as well as sole stockholder of the corporation, and he thereupon determined that the business should be liquidated.

At the time this intention was formed, the corporate assets consisted of five buildings, and three sets of unimproved lots. The corporation actively operated these buildings, with the exception of the Circle Theater Building, which was leased by the Circle Theater Company, a corporation whose stock was owned by Col. Woodlaw. Within a year of his decision to liquidate the assets of the business, Col. Woodlaw had succeeded in disposing of two of the buildings and two of the three sets of lots. The following year, he also sold the Circle Theater Company to Mr. Gamble, who had been attempting for years to work out a deal for that business without any success. The purpose of this transaction was to establish a desirable tenant in the Circle Theater Building so as to make it attractive to a prospective purchaser. He also leased the Fourth Avenue Hotel Building, and it may fairly be inferred that he was actuated by the same business motive in that transaction.

Appellant makes much of the finding by the Court that the Woodlaw Investment Company continued in the same type of business until the time of trial. (R. 129) It is apparent from the foregoing review, however, that while the corporation was still in the business of owning and operating real estate, the nature and emphasis of the corporation's activities was being changed from

active operation of the properties to a mere holding company which was endeavoring to liquidate its remaining assets. Moreover, the record clearly establishes that during the years 1947 and 1948, although the corporation was still in business, Col. Woodlaw engaged in at least two protracted negotiations in an effort to sell the remaining substantial assets of the corporation—the half-block comprising three buildings—for the sum of one million dollars. Had he succeeded in so doing, the corporation would have had no assets but cash and one unimproved lot. The Court will no doubt take judicial notice that purchasers for a transaction of this order of magnitude are not readily come by. There is no suggestion in the record to support appellant's insinuation (Appellant's Brief, p. 27) that the price asked may have been excessive. Mr. Rogoway, in fact, who was one of the parties with whom Col. Woodlaw negotiated, testified that he was interested in purchasing the property (R. 68) but that he and his associates eventually decided that it was too big a transaction for them (R. 69).

Certainly it cannot be said, as appellants seem to contend, that simply because Colonel Woodlaw was unable to find a purchaser of these properties for a million dollars within a few months, that there was no intention to liquidate. His efforts to "unload everything he had," in fact, continued right up to the time of his death (R. 119).

It is thus apparent that every major corporate activity from December, 1945, on, was taken with the intention of carrying out a complete liquidation of the

corporate business. Some buildings were sold, efforts were made to sell the rest, and in the meantime, responsible tenants were established in the properties in order to operate them and make them more readily salable. Although it is true that no witness directly testified that it was in pursuance of this plan of liquidation that Colonel Woodlaw's stock was purchased and retired by the corporation, we do not think that it was an unreasonable inference for the District Court to draw, in view of the fact that shortly before, 700 shares of stock, issued, but not outstanding, had been retired (Pl. Exh. No. 13, R. 99-100) and all of the other activities of the corporation were steps taken in connection with the plans of liquidation.

The Court will note that throughout the previous discussion we have used the name of decedent, Colonel Woodlaw, almost synonymously with that of the corporation. It would be futile to attempt to gloss over the fact that since decedent was substantially the sole stockholder and the active manager thereof, his intentions and purposes were necessarily those of the corporation. Nevertheless, we feel that a distinction can be drawn between corporate purposes and individual purposes, and the fact that a certain line of action serves individual purposes does not necessarily mean that it cannot serve a legitimate corporate purpose as well. In this connection, the appellant appears to wish to have his cake and eat it too—he points out that the corporation's failure to declare dividends was necessarily due to Colonel Woodlaw's decision (Appellant's Br., p. 20);

but at the same time, he asserts that there is no evidence that the corporation as such intended to liquidate because Colonel Woodlaw's intentions to liquidate cannot be taken as any evidence of such intention on the part of the corporation (Appellant's Br., p. 25).

We wish to point out to the Court the carefully considered opinion in *Keefe v. Cote*, 213 F2d 651 (CA 1, 1954), involving a distribution to substantially the sole stockholder of a corporation, wherein the Court stated, at p. 657:

"In cases such as this, in which the stockholder-taxpayer and the principal if not as a practical matter the only corporate officer are one and the same person, it is difficult, to say the least, to distinguish between corporate purposes on the one hand and stockholder purposes on the other for transaction of the kind involved. But the background for the redemption and distribution sheds some light on its purpose. As already appears the block of 248 shares was originally given to the taxpayer in settlement of his claim for salary, the purpose of the exchange of the stock for the note being a corporate one, i.e. to improve, or at least to remove what was considered to be an adverse reflection upon, the corporation's credit position. And the taxpayer testified that when the certificate for the 248 shares was issued to him it was understood that the corporation would redeem them when it could do so conveniently. Thus it could be found that there was a corporate purpose in issuing the shares, and it could also be found that they were redeemed in carrying out that corporate purpose."

Here, too, there was a legitimate business purpose of the corporation to be served. The sole stockholder and manager of the business was becoming too old to carry

on the active management of the business, and the "heir apparent" had met an untimely death. There being no one left to carry on the management, it was an entirely proper corporate purpose to embark upon a plan of liquidation, and in connection therewith, to reduce the capital stock from 3500 shares to 1400 shares.

As the Court stated in the case of *Commissioner v. Sullivan*, 210 F2d 607, 610 (CA 5, 1954):

"The distribution of the high-pressure leases and the drilling equipment constituted a contraction of Texon's business. When there is a contraction or shrinkage of corporate business, the need of a corporation for funds to carry on its former activities is largely eliminated. Following a contraction of its activities, and with surplus funds on hand, good business and accounting practices dictated a redemption of a portion of the corporation's capital stock. Failure to reduce its capital would have resulted in the payment of unnecessary capital-stock taxes contrary to good business practices. There were other factual considerations that entered into the decisions of the Tax Court."

The Factors Relied upon by Appellant

Appellant sets forth seven factors which he asserts have been held to be determinative of the issue here presented, (Appellant's Br., Section B, pp. 14-17) all of which are asserted to be present in this case. The most important factor, and one which he here considers of overriding importance, is that of pro rata cancellation and distribution of the stock. In support of his proposition that this factor should be determina-

tive of the case, he cites the decision in *Commissioner v. Roberts*, 203 F2d 304 (CA 4, 1953), among others.

In the *Roberts* case, the Tax Court (17 T. C. 1415 (1952)) had held that a redemption of stock belonging to taxpayer was in reality a redemption of the stock of his brother's estate, and hence that the case fell under the rule that the cancellation of all of the stock of a particular shareholder was not the distribution of a taxable dividend. (See Treasury Regulations 111, Sec. 29.115-9, reproduced at Appellant's Br., p. 33) The Court of Appeals determined that the Tax Court was in error in holding that the stock belonged to the estate, since it had been transferred to the taxpayer, and reversed, taking pains to point out that there was a large and unnecessary accumulation of cash, that there was no intention to liquidate or contract the business, and that the redemption served no business purpose of the corporation (203 F2d at p. 306). In other words, the sole basis of the Tax Court's opinion having been erroneous, there was left no reason for concluding that the distribution was anything but equivalent to the distribution of a taxable dividend. The issue involved in the *Roberts* case is not present here, and the issue here was not involved in the *Roberts* case. The Court did not there find that the Tax Court had erred in its fact-finding regarding essential equivalence, but that its error was a question of law regarding ownership of the redeemed stock.

The other authorities cited by the appellant at page 15 of his Brief are not especially relevant. In the cases

of *Chandler's Estate v. Commissioner*, 228 F2d 909 (CA 6, 1955); *Vesper Co. v. Commissioner*, 131 F2d 200 (CA 8, 1942); and *Flanagan v. Helvering*, 116 F2d 937 (CA DC, 1940), the factual conclusions of the lower tribunal regarding essential equivalence to a dividend were *affirmed*. They certainly constitute no authority for contending that a pro rata distribution is sufficient ground for *reversing* the trial court's finding as clearly erroneous. In *Stein v. United States*, 62 F. Supp. 568 (Ct. Clms., 1945), by a three to two decision made a factual determination that the distribution there involved was essentially equivalent to a dividend. The Court mentioned (p. 572) that the corporation "had no thought of liquidating its operating assets, or curtailing its operations."

Appellants seem to ignore the fact that where the taxpayer is the sole stockholder, any distribution must necessarily be pro rata. If the problem were as simple as appellant would have it, the statute or the regulations would only need to say that any distribution to a sole stockholder shall be considered a taxable dividend. Needless to say, neither statute nor regulation so provides. In fact, the regulation upon which appellant so heavily relies (Appellant's Br., p. 15) clearly implies that pro rata distributions are not always taxable dividends, by saying that "generally" they are. Certainly a pro rata distribution to several stockholders presents a considerably stronger case than a distribution to a sole stockholder, for the simple reason that a distribution to a sole stockholder must, in the nature of things, be pro rata.

As the Court said in the previously cited case of *Commissioner v. Sullivan*, 210 F2d at p. 610:

“Strong as is the pro-rata factor in this case, it is not sufficient in itself to require or authorize us to set aside the findings of the Tax Court and invoke the application of Section 115(g). To do so would nullify the regulation that authorizes the complete retirement of any part of the stock, whether or not pro rata among the shareholders.”

Judge Rives, dissenting, insisted that the pro rata factor should be determinative in this case, though recognizing that some of the decisions had considered the factor of business contraction or liquidation.

The appellant complains that although the fact that Colonel Woodlaw's relationship to his company and his control over it remained unchanged was “significant,” it was not considered “important” by the District Court. (Appellant's Brief, p. 19) It is true that the District Court did not find this factor controlling, but he no doubt gave it the importance he felt it deserved in the over-all picture, rather than the overriding all-importance attributed to it by appellant herein.

Of the other factors relied upon by appellant, it cannot be gainsaid that there was closely held corporate stock and a failure to declare regular dividends. There is no showing, however, although earnings were large, that there were excessive accumulations of cash, prior to the inception of the liquidation program. In fact, the only evidence in the record regarding the cash position of the corporation is its 1946 tax return, which shows cash of \$19,739.66 on hand at the beginning of

the year, before any sales had been consummated. There is nothing in the record from which it may be concluded that this was unreasonable or unnecessary. The mere existence of a substantial earned surplus does not mean that working capital is excessive. The earnings of the corporation had been reinvested in capital assets.

The next factor is intention to continue in business, and actual continuation in business. Despite the lack of a corporate resolution of which appellant complains, (Appellant's Br., p. 25) the evidence is overwhelming that it was the intention of the sole stockholder to liquidate the entire business. The evidence is also overwhelming that he did liquidate a substantial part thereof, changed the nature of the balance in an effort to make it more attractive to prospective purchasers, and made extensive efforts to dispose of the balance.

The factor of motive to aid the stockholder, as well as the corporation, is a difficult problem, as we have already mentioned, but there is certainly substantial evidence that a legitimate business purpose of Woodlaw Investment Co., as a separate entity from Colonel Woodlaw, was served by the liquidation plans. As will be hereinafter shown, it has been held that the impending retirement of the manager of the business is a legitimate reason for a contraction of corporate business, and a consequent liquidation or partial liquidation. Moreover, and more significant, there is a complete absence of any individual purpose on the part of Colonel Woodlaw other than the desire to liquidate his holdings. Had there been shown an immediate need of cash

on his part, the appellant might properly contend that this liquidation served his personal purposes, and had no relation to any proper purposes of the corporation. But the fact that Colonel Woodlaw was getting too old to manage the affairs of the corporation himself and saw no prospect of a successor is at least as much a corporate as an individual purpose.

Not only is there no motive of tax avoidance, but the procedure adopted actually had the effect of incurring a capital gains tax which otherwise would not have had to be paid. Colonel Woodlaw was an old man. Had he held the stock until his death, it would have passed to his heirs at its stepped-up basis, without any capital gains tax being incurred. Internal Revenue Code of 1939, Section 113(a)(5). But apparently Colonel Woodlaw felt that the reduction of the corporate capital thereby accomplished in furtherance of his plan of liquidation justified the distribution. There is an entire absence of any other purpose for the transaction in the record.

Finally, the appellant cites as a factor "facts showing that the net effect of a purchase and retirement of stock is to distribute corporate earnings just as if a cash dividend had been declared and paid." Just what facts he refers to cannot be determined. The Code specifically provides that amounts distributed in partial liquidation shall have capital gains treatment unless "essentially equivalent to the distribution of a taxable dividend," which seems to imply that earnings may be distributed to stockholders "at such time and in such manner" as not to be treated as dividends.

The Distribution Was Made in Partial Liquidation of the Corporation

The appellant, as stated in the beginning of this Brief, relies upon inferences and guesses, drawing his own conclusions from the testimony. Thus he states that the record is "devoid of any evidence of a business purpose." (Appellant's Br., p. 22) Then he asserts that the intention to liquidate the company "is not *conclusively* proved by the evidence." (Appellant's Br., p. 24) He suggests that if there were a legitimate business purpose "it would seem that such purpose should have been stated in the resolution" because it is customary for a corporation to indicate in its minutes that it is liquidating. (Appellant's Br., p. 25) He states, at the same page, that there is no evidence that the company intended to liquidate. He suggests that "we may properly infer" from the tax return that some business activity was carried on during the year 1946 (Appellant's Br., p. 28). And finally, he states that "we do not admit" that evidence that the company was actually in liquidation proved that it was. (Appellant's Br., pp. 29-30) Needless to state, his refusal to admit facts found by the District Court on substantial evidence is immaterial.

He also cites the case of *Beretta v. Commissioner*, 141 F2d 452 (CA 5, 1944) for the proposition that the acts and doings of the corporation are the best evidence of corporate intent to liquidate. It should be noted, in the first instance, that this case too was an affirmance of the Tax Court, and the Court of Appeals was pointing to evidence tending to support the Tax Court's findings. What it said, however, is nevertheless significant.

“There must be a manifest intention to liquidate and a continuing purpose to terminate and dissolve the corporation. Its activities must be directed to that end. The question of whether a corporation is in liquidation is not necessarily resolved by corporate resolutions, but the solution lies in the intent, to be determined by the acts and doings of the corporation. The process of liquidation is not a status that can be assumed or discarded at will, but is a condition brought about by affirmative action, the normal and necessary result of which is winding up the corporation. The adoption or failure to adopt a resolution of liquidation is not controlling. *Kennermer v. Commissioner of Internal Revenue*, 5 Cir., 96 F. 2d 177.

This leads to the inquiry, whether or not the distribution or dividend was made with the intent that the corporation would remain as a going concern or was it made with the affirmative intent to ultimately liquidate the company. *Holmby Corporation v. Commissioner of Internal Revenue*, 9 Cir., 83 F. 2d 548; *Canal-Commercial Trust & Savings Bank v. Commissioner of Internal Revenue*, 5 Cir., 63 F. 2d 619.”

The act and doings of the corporation, therefore, are nothing more than evidence of the intent of the corporation at the time of the distribution. It is clear that at the time of this distribution, and for several months prior thereto, there was an intent on the part of the sole stockholder to liquidate. Moreover, the affirmative “acts and doings of the corporation” bear out this intent. Thus, there were sales of two major capital assets, and an effort made to sell the remaining capital assets. Changes were made in the operation of the business, from the corporation operating the properties itself to leasing them to others, with the intention of making

them a more desirable investment for a prospective purchaser. There can be no question but that there was substantial evidence that at the time of the transaction in question, the corporation intended to liquidate, and was taking all necessary steps to do so. The fact that a buyer with \$1,000,000 could not readily be found certainly does not disprove an intent to liquidate, and in the meantime the corporation had the properties. It had no alternative but to operate them in some manner, but the method was changed from active operation to leasing to other operators.

It is interesting to compare the position taken by appellant herein with the position taken by the Government in the cases cited in the *Beretta* case, *supra*. In each of those cases, the Board of Tax Appeals was affirmed, the Courts holding that there was substantial evidence that the distributions in those cases were made in liquidation. In those cases, the taxpayer was trying to contend that the transaction was not a liquidation.

In *Canal-Commercial Trust & Savings Bank v. Commissioner*, 63 F2d 619, 620 (CCA 5, 1933), the Court said:

“The determining element therefore is whether the distribution was in the ordinary course of business and with intent to maintain the corporation as a going concern, or after deciding to quit with intent to liquidate the business. Proceedings actually begun to dissolve the corporation or formal action taken to liquidate it are but evidentiary and not indispensable.”

In *Holmby Corp. v. Commissioner*, 83 F2d 548, 549 (CCA 9, 1936) this Court held that the findings of the

Board, being supported by substantial evidence were conclusive, and went on to point out:

“On the facts, as found, the Board’s conclusion that the distributions in question were not ‘dividends,’ but were distributions in liquidation of a corporation was clearly correct. The fact that the distributions were called ‘dividends’ and were made, in part, from earnings and profits, and that some of them were made before liquidation or dissolution proceedings were commenced, is not controlling. (Citing cases.) The determining element is whether the distributions were in the ordinary course of business and with intent to maintain the corporation as a going concern, or after deciding to quit and with intent to liquidate the business.”

In *Kenemer v. Commissioner*, 96 F2d 177, 178 (CCA 5, 1938) the Court stated:

“It is not material that the distribution was not specifically designated as a liquidating dividend or that no formal resolution to liquidate or dissolve the corporation had been adopted when the distribution was made. An intention to liquidate was fairly implied from the sale of all the assets and the act of distributing the cash to the stockholders . . . The determining element was the intention to liquidate the business, coupled with the actual distribution of the cash to the stockholders.”

All of these cases arose under Section 115, or its predecessor, Section 201. In all of them, the Commissioner was contending that the distribution had been in connection with a liquidation. In all of them, the Courts of Appeal upheld the fact-finding of the lower court to the effect that the distributions had been made in liquidation, despite the absence of formal corporate action. All of them hold that the determinative factor

is the intent to liquidate. Despite the appellant's differing interpretations, there was substantial evidence from which the District Court could and did find that there was an intent to liquidate in this case.

Appellant correctly points out that "as sole stockholder and president of the Woodlaw Investment Company, Woodlaw could, of course, have paid dividends at any time." (Appellant's Br., p. 20) He apparently refuses to recognize the equally obvious proposition that as sole stockholder, and president of the corporation, Colonel Woodlaw could have liquidated any time that he intended to, and the record is overwhelming that starting in December of 1945, that was precisely what he intended. We do not think it was far-fetched for the Court to impute the same intention to the corporation, even in the absence of a resolution, when every major corporate activity from that time onward was taken with a view toward liquidation and was consistent with an intent to liquidate. Colonel Woodlaw died before he had succeeded in finding a purchaser for this million-dollar property, and consequently the liquidation was never carried out.

Despite the fact that the liquidation was not completed, there was clearly a partial liquidation within the code definition. (Sec. 115(i) quoted in Appellant's Br., p. 32)

Aside from arguing that there was no liquidation in this case, appellant's sole point is that even if there was, there is no evidence of any connection between the intention to liquidate and the retirement of the

stock. We feel that the timing alone is sufficient to justify the District Court in holding that there was such a connection. We have here a man who had actively operated a business for years and had reached an advanced age. In November, 1945, a beloved son, whom he had expected to succeed him, suddenly is killed. In December, he forms a plan to liquidate his business, and sales of property are made in pursuance of that plan in January*, in February, in April and in May of the year immediately following. Leases are executed in pursuance of the plan in 1946 and 1947. Efforts are made to sell the balance of the property. Similarly, in February of 1946, the 3500 shares of stock were reduced to 2800. A few days later, the transaction here in question took place. Is it "clearly erroneous" for the District Court to infer that this too was a part of the liquidation plan? Every other activity in which the corporation is shown to have engaged during the period is consistent with liquidation; why should this be the only exception?

The Courts Have Held That a Policy of Contraction of the Business, the Advanced Age of the Managing Stockholder, or a Partial Liquidation, Are Sufficient Business Reasons for a Distribution, Preventing the Application of Section 115(g).

Each case under this section of the code must be determined upon its own facts. As the Court stated in *Jones v. Griffin*, 216 F2d 885, 887 (CA 10, 1954):

*See note, p. 6.

“No inflexible and unyielding rule of thumb has been devised for ready use in determining in every instance whether a transaction constituted a partial liquidation within the scope and meaning of section 115(c), or was the equivalent of a taxable dividend within the purview of section 115(g). A critical examination of the statute negates the suggestion that a weighted formula can resolve the crucial question in every case. But certain criteria are recognized for determining the question.”

The Court thereupon sets forth some of the relevant criteria, including some of those mentioned by appellant in his Brief.

In view of the dependence of each decision upon its peculiar facts, we do not wish to present an exhaustive analysis of the cases holding that a distribution in particular cases is not the equivalent of a taxable dividend. We present, therefore, a brief summary of some of the relevant cases, showing the facts present in the instant case have been relied upon to uphold the factual determination of the trial courts in finding that there was not equivalence to a dividend, or, in the case of lower court decisions, to arrive at that conclusion.

In *Commissioner v. Sullivan*, 210 F2d 607 (CA 5, 1954) the Court held that the Tax Court did not err in finding that a pro rata distribution to the only two stockholders was not essentially equivalent to the distribution of a taxable dividend. The Court, pointing out that the “net effect” test was nothing more than a paraphrase for essentially equivalent, held that the contraction in the company’s business justified the redemption of a portion of the corporation’s capital stock.

In *McDaniel v. Commissioner*, 25 TC No. 39, Nov. 22, 1955, the Tax Court held that a distribution to the sole stockholder was not a taxable dividend. The circumstances of the case are exceedingly close to the case before this Court. The corporation had accumulated earnings. No resolution of liquidation was passed by the Board of Directors. The Tax Court found, however, that the corporation had been in the process of complete liquidation since 1941, the distribution in question having been made in September, 1948. As of 1954, the corporation had still not been dissolved.

The Tax Court pointed out that "There is room for the operation of both sections 115(c) and 115(g)." Finding that the corporation had consistently contracted its business and had pursued a policy looking forward to complete liquidation, the Tax Court determined that the net effect of the distribution was a partial liquidation, despite the fact that as of the time of the hearing, the corporation had not been liquidated, and no resolution of liquidation had ever been adopted.

In *Keefe v. Cote*, 213 F2d 651 (CA 1, 1954) the First Circuit affirmed a jury verdict that there was no essential equivalence to a dividend, although finding that the distribution in question had been substantially pro rata, and that there was no policy of contraction or partial liquidation. The Court held that the existence of a legitimate business purpose for the issuance and redemption of the stock was sufficient to permit the trier of the facts to determine that the distribution was not essentially equivalent to a dividend. In the par-

ticular case, the stock was issued to the taxpayer in payment of a note which the corporation owed him, in order to improve the corporation's credit position. It was redeemed in order to enable him to repay the money which he owed his mother on the purchase of her stock in the corporation. The taxpayer, who was the only substantial stockholder, testified that at the time the stock was issued to him it was understood that it would be redeemed when the corporation could conveniently do so.

In *Commissioner v. Straub*, 76 F2d 388 (CCA, 3, 1935), the facts, which were again very similar to those here involved, were summarized by the Court as follows:

"In this case we have a close family business which had accumulated a large surplus and was desirous of gradually liquidating its assets and going out of what had once been a highly prosperous, but was now a losing, business. The Commissioner determined the payments made to the taxpayer constituted dividends and not partial liquidation. On appeal, the Tax Board held with the taxpayer, and the Commissioner took this appeal."

The Court held that there was evidence to justify the Board in its decision, and in language particularly pertinent to the present case, quoted from the Board's decision as follows:

"It is entirely consistent with a purpose to liquidate that the corporation and its management should continue the operation of the business as long as there was a reasonable justification for their judgment that this was the wisest course."

In another case which contains elements of similarity to the present one, the Fifth Circuit reversed the de-

termination of the Board of Tax Appeals in holding that a particular distribution was a dividend. In *Bynum v. Commissioner*, 113 F2d 1 (CCA 5, 1940) the taxpayer received what was designated as a liquidating dividend. The commissioner contended that the company was still doing business, because it retained a piece of realty and would not sell it for \$200,000. The Court held that the liquidators had the discretion to hold out for \$300,000 if they considered that a fair price.

In *Upham v. Commissioner*, 4 T. C. 1120 (1945) the advanced age of the two chief stockholders, who were contemplating the liquidation of their corporation, was held to be a sufficient business season to justify a partial distribution by the corporation. Redemption under such conditions was held not essentially equivalent to the distribution of a taxable dividend.

In *Imler v. Commissioner*, 11 T. C. 836 (1948), the corporation had not paid a dividend since 1934. In December, 1941, a fire destroyed part of its building. The insurance proceeds were insufficient to cover the cost of rebuilding. The excess insurance proceeds were distributed pro rata to the three shareholders in redemption of a portion of their stock. The Court held that the contraction of business and reduction in the amount of capital used constituted a legitimate reason for reducing the capital and held the distribution not equivalent to a dividend.

In *Maguire v. Commissioner*, 222 F2d 472 (CA 7, 1955) the Tax Court was reversed in holding that there was a distribution equivalent to a dividend, the Com-

missioner arguing that there was no evidence of a final decision or settled purpose to liquidate. The Court held that the undisputed facts proved an intention to liquidate, a cessation of all business activities except those essential to liquidation, and a continued and undeviating process of liquidation. The Court stated:

“While we do not disagree with the Commissioner’s contention that the length of time actually consumed in carrying out a purported plan of liquidation is an element to be considered, we do not believe that there is any inflexible element in the time factor, especially where a plan calls for liquidation through a series of distributions. . . . we must recognize that while the size and intricacies of operation of one corporation might reasonably require but a year or two for its orderly voluntary liquidation, many years might reasonably be required for such a liquidation of another corporation . . . While we do not believe that, as a practical matter, the shareholders might not change their minds and reject any liquidation plan, even after it has been partially executed, we find no such action or even intention to so act in this case.”

It thus appears that the elements upon which appellee here relies—the advanced age of the sole stockholder, the intention to liquidate the corporation, the carrying on of activities consistent with the intention to liquidate, and a general policy of contraction of the corporate business, have all been held to be significant factors in affirming or concluding that a distribution did not fall within the scope of Section 115(g). The factors relied upon by appellant—the pro rata distribution and the failure to complete the liquidation within a short period of time, have been rejected in particular

cases as not obviating this conclusion. Therefore, we submit that the finding of the trial court in this case is supported by substantial evidence, showing facts which have been held to prevent the application of Section 115(g), and is not clearly erroneous.

The Cases Cited by the Commissioner Do Not Support the Reversal of This Decision

It is universally held that the question with which we are here concerned is one of fact. It has also been frequently pointed out that no general rule or formula covers all situations, and that each case must be decided on its own particular facts. *McGuire v. Commissioner*, 84 F2d 431, 432 (CCA 7, 1936) With these rules in mind, the Courts have been extremely slow to set aside the factual determination of the trial courts regarding the essential equivalence to a dividend of a particular distribution. Appellant has not cited in the body of his Brief a single case in which it was held that the trial court's factual determination was erroneous. The only two cases he presents in which the trial court was reversed involved questions of law. In *Jones v. Dawson*, 148 F2d 87 (CCA 10, 1945), the Court held that Section 115(c) had no application because there had been no redemption of the stock involved. In *Commissioner v. Roberts*, 203 P2d 304 (CCA 4, 1953) the Court held that the trial court erred in finding that a distribution made to one stockholder who had purchased stock from his brother's estate was in reality made to the estate. In every other appellate court decision cited by

the appellant, the factual determination of the trial court was affirmed.* The rules and formulas set forth in those decisions simply set forth criteria under which the Court could say that the decision of the trial court was not clearly erroneous. Not one holds that the criteria there laid down are the exclusive tests.

Thus it appears that appellant has not presented a single authority holding, on any state of facts whatever, that the factual determination of the trial judge was erroneous. He has not presented a single authority in which there actually was a redemption from the particular taxpayer involved in which there has been a reversal on the ground that it was clearly erroneous to hold that a distribution was not substantially equivalent to a dividend. There may be such cases. Appellant's attorneys, however, who are presumably familiar with this field, have not thought any of them sufficiently relevant to cite in their opening brief. To paraphrase appellant's argument (see bottom of p. 29 of Appellant's Brief): It is apparent that appellant's attorneys do not believe that there is any such authority, and neither do we.

**Chandler's Estate v. Commissioner*, 228 F2d 909 CA 6, 1955); *Flanagan v. Helvering*, 116 F2d 937 (CADC, 1940); *Vesper Co. v. Commissioner*, 131 F2d 200 (CA 8, 1942); *Hirsch v. Commissioner*, 124 F2d 24 (CCA 9, 1941); *Smith v. United States*, 121 F2d 692 (CA 3, 1941); *Boyle v. Commissioner*, 187 F2d 557 (CA 3, 1951); *Rheinstrom v. Conner*, 125 F2d 790 (CA 6, 1942); *Hyman v. Helvering*, 71 F2d 342 (App DC, 1934), cert. den., 293 U.S. 570; *Beretta v. Commissioner*, 141 F2d 452 (CA 5, 1944).

CONCLUSION

Whether it would have been reversible error for the District Court to decide that the distribution involved in this case was essentially equivalent to the distribution of a taxable dividend, is an issue that is not involved in this case. The sole question presented is whether the District Court's determination that this was not such a dividend can be characterized as clearly erroneous.

We believe that there was substantial evidence from which the District Court was entitled to believe that the corporation was in liquidation from December, 1945, until the date of Colonel Woodlaw's death. Despite the contentions of appellant, there is not a single activity in which the corporation is shown to have engaged after that period which was not consistent with, and in furtherance of that purpose.

We further contend that the District Court was correct in concluding that the distribution here made was in furtherance of that plan, and that it was essentially a distribution of capital assets. There is no evidence that the distribution served any individual purpose of the taxpayer, other than his desire to liquidate his holdings because of his age, which was a legitimate corporate as well as individual purpose. He was an old man, and the stock in the corporation could have passed on to his heirs in his estate at a stepped-up basis without tax. The appellant's contention that the distribution served only the individual purposes of the taxpayer would have more force if there was a single iota of

evidence that he was in need of cash, or had any individual purpose to be served by the distribution.

Moreover, a substantial part of the payment for the stock, over \$60,000, was actually made by the distribution in kind of the seller's equity in the contract for the sale of one of the capital assets.

In conclusion, then, the District Court's decision is supported by substantial evidence of a legitimate corporate purpose and an actual program of liquidation undertaken and partially consummated. The judgment of the Court below is not clearly erroneous, and should be affirmed.

Respectfully submitted,

GEORGE W. MEAD
STEPHEN W. MATTHIEU,
Attorneys for Appellees.

No. 15063

United States
Court of Appeals
for the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Montana, Billings Division

FILED

JUL 26 1956



No. 15063

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In the District Court of the United States,
District of Montana, Billings Division

No. 1313

JOSEPH P. HENNESSEY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiff complains and alleges:

1.

This cause of action is brought under the provisions of the Legislative Re-Organization Act of 1946, Title IV, Federal Tort Claims Act, Part 3, Section 410 a, second session of the 79th Congress of the United States of America and amendments thereto Title 28, Section 1346 b, Section 2674 and Section 2671, U. S. C. A. This matter in controversy, exclusive of interest and costs exceeds the sum of Three Thousand Dollars.

2.

That the plaintiff is and has been during all of the time herein mentioned resides in and was a resident of Billings, Montana, in the District of Montana and is and was a citizen of the State of Montana.

3.

That on the 2nd day of June, 1949, the plaintiff was a passenger and accepted the invitation of

Western Air Lines Incorporated, a corporation, to become a passenger of said common carrier of passengers by air from its airport at Pocatello in the State of Idaho to fly to Butte, Montana, and while at its depot at Phillips Field said plaintiff entered the men's toilet of the said airport at Pocatello, Idaho, and while using the toilet facilities was injured as the approximate result of a servant and employee of the defendant who was then and there acting within the scope and course of his employment for the defendant and pursuant to his duties for the defendant as hereinafter specifically alleged.

4.

That on the 2nd day of June, 1949, one Fay R. Livingston was employed by the United States Department of Commerce at Phillips Field, Pocatello, Idaho, working for the United States Weather Bureau and about the hour of 2:10 p.m. of said day was engaged in the course and scope of his employment for the defendant, upstairs in the said airport building and he negligently and carelessly entered an upstairs room above the aforesaid men's toilet and negligently walked between the rafters of said upstairs room and fell through the space between said rafters and the ceiling of said men's toilet and fell violently upon the plaintiff while he was rightfully using the toilet facilities of said airport.

5.

That as the proximate result of the aforesaid negligence, plaintiff sustained a severe wrenching,

bruising and contusing of the muscles, tissues and tendons of his neck and right shoulder and the muscles, tissues and tendons of the cervical dorsal and lumbar spine were strained and the right supraclavicular nerve was crushed and plaintiff sustained other internal injuries which plaintiff alleges, on his information and belief, caused an embolus to form and travel through the blood vessels and lodged and cause paralysis of plaintiff's right and left legs and permanent impairment of plaintiff's left leg and great pain and suffering ever since said injury all of which was due to and proximately caused by the aforesaid negligence of said servant and employee of the defendant while he was engaged in the course and scope of his employment by defendant and thereby plaintiff has sustained damage in the sum of fifty thousand dollars.

6.

That as the proximate result of said negligence and his injuries sustained as aforesaid plaintiff has been required to incur expense for the services of physicians and surgeons and hospitalization and he has incurred, and on his information and belief, alleges that he will be required to incur expense for hospitalization in a total sum of two thousand dollars and for the services of physicians and surgeons a total sum of fifteen hundred dollars and thereby plaintiff has been further damaged in the sum of thirty-five hundred dollars.

Wherefore plaintiff demands judgment in the sum of fifty-three thousand five hundred dollars and costs of suit.

DOEPKER & HENNESSEY,

By /s/ M. J. DOEPKER,

Attorneys for Plaintiff.

[Endorsed]: Filed June 1, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now the above-named defendant, The United States of America, by and through Dalton Pierson, United States Attorney, and Emmett C. Angland, Assistant United States Attorney for the District of Montana, and for answer to plaintiff's complaint on file herein, admits, denies and alleges:

1.

Admits the allegations in paragraph 1 of said complaint.

2.

Admits the allegations in paragraph 2 of said complaint.

3.

Answering paragraph 3 of said complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the

truth of the allegations in said paragraph 3, and therefore denies the same.

4.

Admits that Fay R. Livingston was employed by the defendant on the 2nd day of June, 1949, and was working at the United States Weather Bureau; and as to the other allegations contained in said paragraph 4 of plaintiff's complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations and therefore denies the same.

5.

Answering paragraph 5 of said complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations and therefore denies the same.

6.

Answering paragraph 6 of said complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations and therefore denies the same.

7.

Denies each and every matter, fact and thing contained in plaintiff's complaint and not herein specifically admitted.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff take

nothing by reason thereof and that the United States of America, defendant herein, have judgment for its costs and disbursements herein incurred.

DALTON PIERSON,

United States Attorney

for the District of Montana.

/s/ EMMETT C. ANGLAND,

Assistant United States Attorney for the District
of Montana.

[Endorsed]: Filed February 15, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came regularly on for trial before the above-entitled Court, sitting without a jury, on the 15th day of January, 1953, and after being continued from time to time was completed on February 6th, 1953; the firm of Doepker & Hennessey appeared as attorneys for plaintiff, and Emmett C. Angland, Esq., the Assistant United States District Attorney for the District of Montana, appeared as attorney for the defendant.

The Court having heard all of the testimony and having examined the proofs offered by the respective parties and briefs having been submitted for the respective parties, and the Court being now

fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, to wit:

Findings of Fact

I.

That plaintiff, Joseph P. Hennessey, was, is and has been during all of the time herein mentioned, a resident of Billings, Montana, residing in the District of Montana, and was, is and has been a citizen of the State of Montana.

II.

That on the 2nd day of June, 1949, the plaintiff had accepted the invitation of Western Air Lines, Incorporated, a corporation, to become a passenger on its air line and had arrived at its airport and depot near Pocatello, in the State of Idaho, at a place known as Phillips Field.

III.

That Western Air Lines, Incorporated, provided for its patrons a men's toilet, adjacent to the waiting room at said depot.

IV.

That the United States Department of Commerce occupied for the United States Weather Bureau, a portion of the building also occupied by Western Air Lines, Incorporated, a corporation, which was known as the administration building and the quarters of the United States Weather Bureau and the Western Air Lines, Incorporated, were situated side by side in said administration building.

V.

That the United States Weather Bureau, as a part of its operations for the United States of America, made use of a room known as a pibal of theodolite room which was located adjacent to and above the men's toilet furnished by the Western Air Lines, Incorporated, for its patrons and others.

VI.

That directly above the men's toilet was an attic space in the said administration building, which was unfinished on June 2nd, 1949, and on the afternoon of said day, at the time of the happening of the occurrence hereinafter mentioned, the attic space was dark.

VII.

That the pibal or theodolite room was constructed above a vault situated to the west of the men's toilet mentioned, the floor of the theodolite room being above the vault. The theodolite instrument and the weather observation dome was reached by some steps leading from the floor of the theodolite room to the platform which was used for the operations of the United States Weather Bureau.

VIII.

Just a little above the platform floor, near the top of the stairs leading to the platform, a 110 volt electrical outlet was wired and connected in the south wall of the theodolite room; to the east a cubby hole was located in the easterly wall of the theodolite room which gave access to the attic space. Entry into the attic space through the cubby hole

would be directly above the ceiling of the men's toilet and was on June 2nd, 1949, the ceiling of the men's toilet which was fastened at the base of the joists at the bottom of the attic space immediately adjacent to the theodolite room and easterly therefrom.

IX.

That on June 2nd, 1949, one, Fay R. Livingston, a man five feet four inches in height and weighing between one hundred fifteen and one hundred thirty pounds was employed by the United States Weather Bureau at the administration building at Phillips Field near Pocatello, Idaho. His hours of duty were between eight in the morning and four thirty in the afternoon of that day. He was engaged in his regular work taking observations, weather observations and making maps, plotting radio sound observations. Mr. Livingston had a little over six years' experience working for the United States Weather Bureau. On the afternoon of June 2nd, 1949, Mr. Livingston, in the course of his employment, went to the pibal or theodolite room above the vault mentioned, mounted to the platform, conducted his observations and coming down after he had finished a balloon run, encountered an extension wire which was stretched from the 110 volt outlet, across the stairway, through the cubby hole into the attic space mentioned. He pulled the extension wire out of its socket in some way. He was concerned that he might have left somebody in the dark in the attic. To make certain there wasn't anyone working in there he stepped up on a box beneath the cubby

hole and leaned. To make certain there wasn't anyone working in the attic he attempted to step out on a ceiling joist to look back in the attic to see if there was anyone there and he missed the ceiling joist and fell through the ceiling. At this moment Joseph P. Hennessey, the plaintiff, was in the men's toilet. Livingston fell upon him, striking him high on the right shoulder and back.

X.

Fay R. Livingston fell through the ceiling of the men's toilet between two and two-thirty o'clock of the afternoon of June 2nd, 1949. The plaintiff Joseph P. Hennessey, was in the toilet provided, preparatory to boarding a plane for a trip to Butte, Montana. Fay R. Livingston had very little knowledge of the attic space in the area above the men's wash room. He had not had occasion to be in there before. The Weather Bureau had occupied the building just two weeks prior to the occurrence. It was lighter in the theodolite room than in the attic space through the cubby hole. In entering the attic space Livingston went from a lighter room into a darker room. He did not connect up the light extension or turn on the light.

XI.

While acting in the course of his employment, Fay R. Livingston failed to exercise ordinary care in the following particulars:

He failed to connect up the extension cord by putting the plug back in the wall socket.

He stepped into a place he knew nothing about and where there was not sufficient light for him to see where he was stepping.

He failed to look where he was going as he stepped into the attic. He failed to make sure that he was stepping on a solid joist or plank before putting his weight upon the place where he was stepping.

He went from a lighted room into a dark space, in an area he was not familiar with, knowing that it was above the airport facilities.

He knew the building was unfinished and in the process of construction, yet failed to exercise ordinary care in entering the attic space.

He failed to use means at his disposal—the electric light extension—to light the place where he was stepping.

XII.

That as a direct result of the negligence of Fay R. Livingston mentioned in Finding of Fact XI herein, the plaintiff Joseph P. Hennessey, sustained the following personal injuries:

The muscles, tissues and tendons of his shoulder and neck were hurt, producing a supra-clavicular neuritis of the right shoulder, and plaintiff continues to suffer some slight discomfiture from such condition and will in the future suffer such discomfiture. He sustained an injury to his back. The back injury cleared up. By reason of his injury plaintiff was required to incur the following expenses: Sol-

tero Medical and Surgical Group, Billings, Montana, \$12.00, for treatment of shoulder.

XIII.

That by reason of the negligent acts and omissions of the defendant's servant and employee, Fay R. Livingston, the plaintiff, Joseph P. Hennessey, has sustained damage because of the injury to his shoulder, neck and back, past pain and suffering and disability of the shoulder and neck, as well as future discomfiture, in the sum of \$2,500.00.

XIV.

That on or about January 7, 1950, the plaintiff suffered a blood clot or embolus in his aorta which temporarily lodged where the aorta splits to go down either leg; that thereafter the said blood clot or embolus became dislodged from where it had stopped at the junction of the aorta and slipped down in the artery of the plaintiff's left leg; that as a result of the said blood clot or embolus the blood supply to plaintiff's legs was cut off, plaintiff suffered excruciating pain in the region of the lower back and legs, and plaintiff has suffered considerable, total and permanent damage to his left leg.

XV.

That as a result of all of the evidence in the case and particularly medical testimony, the Court is unable to find that the blood clot, referred to in Finding of Fact XIV, and the resulting damage therefrom, was caused by any injury he sustained when Fay R. Livingston fell upon him at the airport in Pocatello, Idaho, as found above.

From the foregoing facts the Court draws the following

Conclusions of Law

I.

That this Court has jurisdiction hereof, Section 1346(b), Title 28, U.S.C.

II.

That as a direct and proximate result of the said negligent and careless acts and omissions of the servant of the defendant, the United States of America, namely, Fay R. Livingston, acting within the course and scope of his employment, the plaintiff, Joseph P. Hennessey, was injured as aforesaid and is entitled to judgment against the defendant, the United States of America, as follows:

(A) Special damages: Doctor, \$12.00.

(B) Damage because of injury to plaintiff's shoulder, neck and back, \$2,500.00.

III.

Let judgment be entered in favor of the plaintiff, Joseph P. Hennessey, and against the defendant, the United States of America, for the sum of Two Thousand Five Hundred Twelve and no/100ths Dollars (\$2,512.00).

Dated this 24th day of November, 1954.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed November 24, 1954.

Entered November 25, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND
AMENDMENT OF FINDINGS

Comes now the plaintiff above named and moves the Court to grant him a new trial or in the alternative to amend the Court's Findings of Fact and Conclusions of Law upon the following grounds to wit:

I.

That the Court's Finding of Fact number XIV is inaccurate and is contrary to the weight of the evidence.

II.

That the Court's Finding of Fact number XV is contrary to the evidence.

III.

That the Court's Finding of Fact number XV was against the law.

In the alternative plaintiff moves the Court to Amend its Findings of Fact and Conclusions of Law as follows:

To substitute Court's Finding of Fact number XIV by finding in place thereof in accordance with paragraph one, three, four, five, six and seven (un-numbered) of plaintiff's proposed Findings of Fact and Conclusions of Law contained on pages 6, 7 and 8 thereof, from plaintiff's proposed finding 13.

To substitute plaintiff's proposed finding of fact

number 15 instead of Court's finding of fact number XV.

To amend Court's Conclusions of Law in accordance with the findings of fact as thus amended.

Wherefore, plaintiff moves that the Court amend and revise the findings of fact and conclusions of law herein in accordance with this motion, or in the alternative to grant plaintiff a new trial.

Dated this 4th day of December, 1954.

DOEPKER & HENNESSEY.

Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed December 4, 1954.

[Title of District Court and Cause.]

ORDER

No. 1313

The Court has considered the plaintiff's motion for a new trial or in the alternative to amend the Court's Findings of Fact and Conclusions of Law, together with the argument and the briefs and authorities in support thereof, and has reached the conclusion that the motion must be denied in its entirety for the reasons hereinafter set forth.

As to the motion for a new trial, the Court cannot see that a new trial would avail the plaintiff anything. There is no question as to liability in the

case, the only question being one of proximate cause of the terrible condition which later developed in plaintiff. In the trial already had the Court had the benefit of the testimony of the physician who attended the plaintiff at the time the blood clot developed, together with the testimony of other experts and particularly Dr. Horst, who had made a thorough study of the case, and since the trial, has had the benefit of able and extensive arguments and briefs interpreting the evidence of the medical experts at the trial. It seems unlikely to the Court that upon a new trial there would be available to the plaintiff any additional evidence which would influence the Court in its decision. Certainly it seems unlikely that plaintiff could produce any evidence which would change the Court's view of the medical evidence presented on the first trial as hereafter discussed. In addition there has been no showing made of new evidence available to the plaintiff.

In regard to the motion to amend the Court's Findings of Fact and Conclusions of Law, the Court personally would like nothing better than to grant the motion. There is no doubt from the evidence that the plaintiff, Mr. Hennessey, suffered from a very painful and disabling affliction and will in the future continue to suffer. The Court, however, has its own duties and obligations and must be controlled by law. The rule of law, which the Court finds decisive in this case is that the burden of proof rests upon the plaintiff. In other words, while the Court, from its consideration of all of the evidence in the case, is not prepared to

say that Fay R. Livingston, falling upon the plaintiff, did not cause the blood clot and resulting damage therefrom in the plaintiff's legs, still the Court from all of the evidence cannot conscientiously find that Livingston, falling on the plaintiff, did cause the blood clot and resulting damage. In other words, after very serious consideration of the case, the Court, in common with Mr. Hennessey's attending physician, is unable to say what Mr. Hennessey's condition resulted from, or even what it probably resulted from, and in this frame of mind the Court's previous Findings of Fact must stand.

As an example of the state of the evidence which compels the Court to the conclusion it has reached, is the conflict in the testimony between the plaintiff's own medical experts. Dr. Stokoe, the attending physician at the time the catastrophe struck Mr. Hennessey, as well as the other experts who testified, with the exception of Dr. Horst, placed the embolus in the arteries of Mr. Hennessey, while Dr. Horst, in his testimony, placed it in the veins. In order to find the necessary connection between Mr. Hennessey's subsequent condition and the prior incident at the airport in Pocatello to justify a finding of proximate cause, the theory of Dr. Horst, who did not see the patient or examine him until several years later, must be accepted in its entirety, disregarding the findings of the physician who attended the plaintiff as the condition developed.

As stated, in order to find that Livingston, falling on Mr. Hennessey, was the proximate cause of the

blood clot, Dr. Horst's theory must be accepted, and there are circumstances which make it impossible for the Court to follow Dr. Horst's theory. One such circumstance is that all of the experts who testified, including Dr. Horst, agreed that in the event of a thrombosis in the deep veins such as Dr. Horst testified existed in the plaintiff, that collateral circulation of the blood would develop through the superficial veins near the surface and that visible signs of such collateral circulation would appear upon the patient's body. There were no such signs of collateral circulation in Mr. Hennessey's case.

Another difficulty in following Dr. Horst's diagnosis results from the time element, that is the time between the incident causing a pressure thrombosis and the appearance of the symptoms. Dr. Horst testified to the case of the runner who held his breath during the course of a race, thereby causing a pressure thrombosis in the vena cava. However, in that case the symptoms appeared almost immediately. In addition Dr. Horst submitted to the Court an article entitled "Deep Venous Thrombosis in the Leg Following Effort or Strain," printed in the New England Journal of Medicine of April 3, 1952, in proof of his theory that pressure could have caused the thrombosis which resulted in the embolism in Mr. Hennessey. In that article are 13 case histories of deep venous thrombosis in the leg following effort or strain. In each of the case histories the symptoms appeared within 2 or 3 or 4 days after the strain. The same article in discuss-

ing the diagnosis of a deep venous thrombosis, as distinguished from muscle strain, has the following to say:

“The stiffness, pain, and disability of a muscle strain are due to hematoma formation, and thus usually approach their height in four to twenty-four hours; the stiffness, pain and disability of a venous thrombosis follow the gradual establishment of a sufficient degree of venous blockade, which usually requires from two to seven days. The edema (if any) associated with a muscle strain appears in a matter of a few hours and is local; the edema of venous thrombosis does not appear for two to seven days and is diffuse.”

Thus the examples cited by Dr. Horst to prove that a deep venous thrombosis can occur from pressure makes it impossible for the Court to accept his theory in this case. The examples which he cited all state that the symptoms of a pressure or strain caused deep venous thrombosis will occur within from two to seven day after the pressure or strain, whereas in Mr. Hennessey's case the symptoms did not appear until some eight months after the accident which Dr. Horst contends caused the thrombosis.

There is this further difficulty: if the Court could accept the fact that it would take eight months after the causing of a thrombosis in the vena cava in the manner surmised by Dr. Horst for the symptoms to develop, why might it not take three or four years? Several years before Mr. Livingston

fell on the plaintiff, the plaintiff was involved in an automobile accident, in which his immediate symptoms were identical to those he had after Mr. Livingston fell upon him at the airport in Pocatello. There is no satisfactory evidence in the record to differentiate between these two injuries, the immediate symptoms, diagnosis and treatment of which were identical. If a deep venous thrombosis could exist for some eight months before making its unfortunate appearance as an embolism, why could it not exist several years? There is no explanation in the record.

Finally, according to Dr. Horst's theory, the thrombosis occurred in the vena cava and when it became dislodged it went down into the legs against the flow of blood. In all of the literature that the Court has been able to find concerning this subject and according to the weight of the evidence in this case, when a thrombosis of the vena cava becomes detached the resulting embolus follows the flow of blood and results in a pulmonary embolism. In the article copied by plaintiff from the "Surgery, Gynecology and Obstetrics with International Abstract and Surgery" Journal, and submitted to the Court, there are several references to the breaking loose of a thrombus from the vein wall and it is stated "The sudden massive pulmonary emboli usually arise from this type of thrombus." It is further stated in that article "Bland thrombosis is usually not recognized until a massive pulmonary embolism has occurred." Both of the above quota-

tions refer to bland thromboses, a type of thrombosis which develops slowly and without making its presence known, and Dr. Horst explained the delay between the accident at the airport in Pocatello and the onslaught of the embolus upon the ground that the thrombus, which formed, was a bland thrombus. However, as noted before, in each of the examples furnished to the Court of a pressure or strain caused thrombosis, the thrombosis was anything but bland, and made its presence known within a relatively short time. The article last referred to states that a bland thrombosis results from the mildest form of irritation or injury to the blood vessel, whereas, Dr. Horst's theory in this case envisions violent and extensive injury to the vena cava, thus making it unlikely that a bland thrombosis would have resulted.

In view of the foregoing, It Is Ordered and this does order that the plaintiff's motion for new trial or in the alternative to amend the Court's Findings of Fact and Conclusions of Law be and the same hereby is denied.

Done and dated this 29th day of August, 1955.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed August 29, 1955.

Entered August 30, 1955.

In the United States District Court for the
District of Montana, Billings Division

No. 1313

JOSEPH P. HENNESSEY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The Court having filed its findings of fact and conclusions of law herein directing the entry of judgment in favor of the plaintiff and against the defendant and thereafter the plaintiff having moved the Court to grant him a new trial or in the alternative to amend the Court's Findings of Fact and Conclusions of Law which motion was, by the Court, denied, it is

Adjudged, that the plaintiff, Joseph P. Hennessey, do have and recover of the defendant, The United States of America, the sum of Two Thousand Five Hundred Twelve and no/100ths (\$2,512.00) Dollars.

Done this 28th day of November, 1955.

/s/ W. D. MURRAY,
Judge.

[Endorsed]: Filed November 28, 1955.

Entered November 29, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the plaintiff, Joseph P. Hennessey, and hereby gives notice, that said Joseph P. Hennessey, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that certain judgment, deemed grossly inadequate, as to damages, rendered and entered in favor of the plaintiff and against the defendant on November 24th, 1954, after Motion for New Trial and Amendment of Findings denied by the final judgment of said District Court signed and filed November 28th, 1955, and entered herein on November 29th, 1955.

DOEPKER & HENNESSEY,
Attorneys for Appellant.

By /s/ M. J. DOEPKER.

Service of Copy acknowledged.

[Endorsed]: Filed January 25, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL TO UNITED STATES
COURT OF APPEALS FOR NINTH CIR-
CUIT

Know All Men by These Presents:

That the undersigned Surety is held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty (\$250.00)

Dollars, to be paid to said United States of America, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. Sealed with the Corporate Seal of said Surety Company this 20th day of January, 1956.

Whereas lately in the United States District Court for the District of Montana, Billings Division, in a suit pending in said Court between Joseph P. Hennessey, plaintiff, and the United States of America, defendant, judgment was rendered in favor of the plaintiff for an amount which plaintiff deems grossly inadequate and said plaintiff Joseph P. Hennessey has taken an appeal to the United States Court of Appeals for the Ninth Circuit, to reverse the said judgment for inadequate damages and to assess adequate damages against defendant.

Now, the condition of the above obligation is such that if the said Joseph P. Hennessey, plaintiff above named, shall prosecute said appeal to effect and answer all damages and costs if he fail to make good the said appeal, then the above obligation to be void, else to remain in full force and virtue.

Signed with the seal of said Surety impressed, with the signature of its proper officer and attorney in this behalf authorized, this 20th day of January, 1956.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Bonding Corporation,
as Surety.

[Seal] By /s/ H. A. KAWIN,
Attorney-in-Fact,
Its Duly Authorized Officer.

Countersigned:

EXCELSIOR INSURANCE
AGENCY,

By /s/ DON L. ENGLEKING,
Montana Licensed Agent.

[Endorsed]: Filed January 25, 1956.

In the United States District Court for the
District of Montana, Billings Division

No. 1313

JOSEPH P. HENNESSEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PORTIONS OF THE OFFICIAL REPORTER'S
RECORD CONTAINING TESTIMONY OF
WITNESSES FOR INCLUSION IN THE
TRANSCRIPT OF RECORD TO THE
COURT OF APPEALS FOR THE NINTH
CIRCUIT

EXHIBIT "A" ON APPEAL

The above cause came on regularly for trial before the Hon. W. D. Murray, United States Dis-

trict Judge for the District of Montana, sitting without a jury, at Billings, Montana, on the 15th day of January, 1953. The plaintiff was present in person, and represented by his counsel, Messrs. Mark J. Doepker and Maurice F. Hennessey, and the defendant was represented by its counsel, Mr. Emmett C. Anglund, Assistant United States Attorney for the District of Montana.

Whereupon, the following proceedings were had:

JOSEPH P. HENNESSEY

the plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Doepker:

Q. Please tell the Court your name?

A. Joseph P. Hennessey.

Q. And what was the date of your birth?

A. January 17th, 1917.

Q. And are you married or single?

A. Married.

Q. Do you have some children?

A. Three children.

Q. Their ages?

A. One girl five years old, a boy eight years old, and a girl nine years old.

Q. Are those children healthy or unhealthy?

A. Healthy.

Q. During the record of your married life, has there been any miscarriages? A. None.

(Testimony of Joseph P. Hennessey.)

Q. What is your occupation?

A. Attorney at law.

Q. Address?

A. 1221 Grand Avenue, Billings, [6 & 7*] Montana.

Q. Where do you have your offices?

A. The Selvidge-Babcock Building, Billings, Montana.

Q. Is your father living or dead?

A. He is dead.

Q. And do you know the cause of his death?

A. He died from some type of internal injury.

Q. In the year? A. 1943.

Q. Is your mother living? A. Yes.

Q. What is the condition of her health?

A. So far as I know, it is good.

Q. What other members of your family are there?

A. I have a younger brother and a sister.

Q. And was there one of your brothers killed in the war?

A. I had a brother killed in the Philippines during the war.

Q. So far as you know, what are their general conditions of health?

A. The general health of my brother and sister is good.

Q. Do you know of any history of tuberculosis in your family? A. None.

(Testimony of Joseph P. Hennessey.)

Q. Insanity? A. None.

Q. Epilepsy? A. None. [8]

Q. Or cancer? A. None.

Q. Mr. Hennessey, during your early childhood, what, if any, childhood diseases did you have?

A. I believe I had the usual childhood diseases like mumps and measles.

Q. Did you have scarlet fever?

A. No, sir.

Q. Diphtheria? A. Not that I remember.

Q. St. Vitus dance? A. No, sir.

Q. Heart trouble? A. No, sir.

Q. Rheumatism? A. No, sir.

Q. Poliomyelitis? A. No, sir.

Q. In or about the year 1933, did you have any illness?

A. I developed pneumonia the winter of that year and was confined in St. James Hospital in Butte, Montana.

Q. For about what period of time?

A. I believe that was for about two months.

Q. And at that time, Mr. Hennessey, what, if any complications developed from this [9] pneumonia. A. I developed acute nephritis.

Q. And then from a layman's standpoint, will you tell us what the development of that disease was at that time?

A. Well, it is a kidney disorder that causes an edema or swelling of the stomach.

Q. And what was your recovery—state whether or not you had a recovery from that condition?

(Testimony of Joseph P. Hennessey.)

A. So far as I know, after a period of time, I had a complete recovery.

Q. During the war, did you take any examination with the Civil Aeronautics Authority for flying in the Air Corps? A. I did.

Q. And did you fly? A. I did.

Q. After taking that examination?

A. I did, sir.

Q. Were you rejected by the Army on account of the history of nephritis? A. I was.

Q. Also by the Navy? A. Yes, sir.

Q. And by the Air Corps?

A. Yes, sir. [10]

Q. Do you know at this time of your own knowledge whether there was any clinical finding such as albumin, or anything of that sort at that time?

A. I know there were none on at least one Naval examination.

Q. So that we can get some idea of your occupations after this sickness that you had in St. James Hospital in 1933, what did you do after you came out of the hospital?

A. Let's see, I had some high school work to complete, and I went back to high school and completed that work, and then I left the State of Montana and went to California.

Q. Did you follow an occupation or work during the time you were in California?

A. I did various types of work, whatever I could do.

Q. Later did you work elsewhere?

(Testimony of Joseph P. Hennessey.)

A. Well, I worked the year following that out of Minneapolis, Minnesota, as a salesman.

Q. And what have you to tell the Court as to the regularity of your employment? Were you laid off at any time, or did you lay off at any time on account of illness? A. No, sir.

Q. Would that be true from the time you left the hospital? A. That would be true.

Q. Now, after your work as a salesman in Minnesota, or out of Minneapolis, when did you return to Montana?

A. I believe it was in 1937, if I remember right.

Q. And then, what, if any, training did you secure?

A. Well, I went to the School of Mines and took some pre-law, [11] then I went down to the University of Montana and completed the pre-law, and I went to Law School and graduated from the Law School.

Q. Did you pursue a regular course at the University of Montana? A. I did.

Q. Graduating in what year? A. 1943.

Q. Did you receive any degrees?

A. I have a B.A. in History and Political Science, and an L.L.B. in Law.

Q. While in college, did you take part in athletic sports? A. No, sir, I did not.

Q. Did you take part in athletic sports in high school? A. A little, yes.

Q. Now, after graduation from the college, where did you practice, if you did?

(Testimony of Joseph P. Hennessey.)

A. I went to Butte, Montana and practiced.

Q. Then subsequently located where?

A. In Billings, Montana.

Q. When did you locate in Billings?

A. In 1944.

Q. Since 1944, and up until the year 1949, will you say whether or not you were actively engaged in the practice of law? [12]

A. I was actively engaged.

Q. In what field, if any, did you specialize?

A. With mostly trial work, I would say.

Q. During that time that I have indicated, what was the condition of your general health?

A. It was good.

Q. And what with respect to your activity in your profession?

A. I was very active.

Q. And during that period of time that I have indicated, up to the year 1949, in your practice, were you disabled or in the hospital at any time to your recollection?

A. No, sir, I was not.

Q. From 1949, and up until the first part of January, 1950, did you have any illness, or were you confined to St. Vincent's or the Deaconess Hospitals here in Billings?

A. Sometime during the fall of 1949, I was confined to St. Vincent's Hospital.

Q. And do you know what it was?

A. I believe it was for acute laryngitis.

Q. In 1950, did you have occasion to be in a hospital in the first part of the year?

A. As I recall, the laryngitis came back and I

(Testimony of Joseph P. Hennessey.)

lost my voice again, and I was confined in the Deaconess Hospital the first of January, about January 3rd.

Q. Mr. Hennessey, in the course of your business, did you [13] have occasion to visit Pocatello, Idaho?

A. In the latter part of May of 1949, I had a hearing set in Federal Court in Pocatello, Idaho.

Q. Now, we have gone over up to the first part of January, 1950, we have gone over the record or history of your illness and hospital attendance; and I want to inquire whether you were in any other accidents prior to the year 1949?

A. I was in an accident in 1947.

Q. Will you relate and tell the Court what that was?

A. I rolled my automobile over between Toston and Three Forks, and I believe that was sometime during the summer of 1947.

Q. As best you can describe to the Court, what happened in that automobile accident?

A. Well, the damage to the car when the car turned over, but myself, I seemed to have a sore shoulder as a result of it.

Q. Then, will you relate to the Court with respect to that sore shoulder. What was the development of that?

A. Well, after the wreck, I stayed in Three Forks that night. I had the car taken care of and came in to Billings, Montana, the next day, and I

(Testimony of Joseph P. Hennessey.)

went to the doctor, and he examined the shoulder, and I believe he gave me some diathermy treatments, and after about six months, I think it was, the shoulder got well.

Q. From the time this accident occurred that you have [14] referred to when the car turned over, and after that period of six months, did you notice any soreness or pain or discomfort in the shoulder?

A. No, sir.

Q. Which shoulder was that?

A. The right shoulder.

Q. And from a layman's standpoint, did you appear to recover from that accident?

A. I would say so, yes, sir.

Q. Were you in any other accidents prior to the summer of 1949?

A. Well, one night, I believe, in 1948, Northwest had an accident in Butte with one of their airliners, and I was on that airliner that night.

Q. Were you to your knowledge, or any other passengers, injured in that incident?

A. To my knowledge, none of them were injured.

Q. What was the nature of the accident?

A. The plane was coming in for a landing, and I believe he overshot his field and wound up in the graveyard.

Q. Did you notice any ill effects at all from that incident you have now related to the Court?

A. My belly muscles were a little sore the next morning, and that is about all.

Q. Were you strapped in at the time of the

(Testimony of Joseph P. Hennessey.)

landing, strapped [15] into the seat?

A. Yes, sir.

Q. Now, coming to the summer of 1949, and the incident of your having appeared in Federal Court in Pocatello, what, if anything, occurred on or about that time, just generally, I just want you to identify that incident?

A. Well, after, I had a reservation on Western Air Lines going north on June 2nd from Pocatello.

Q. All right, and in response to your reservation, will you say whether or not you visited the airport on that occasion?

A. I believe that plane left Pocatello some time a little after two o'clock, and I took the airport cab from the hotel at whatever time that cab left, and I went out to the airport.

Q. Now, what was your purpose in going to the airport?

A. To take that north bound flight to Butte.

Q. Do you know the date of it?

A. I believe it was June 2nd.

Q. And the year? A. 1949.

Q. With respect to this airport, Mr. Hennessey, will you describe to the Court the facilities, if any, the public facilities with respect to the toilet facilities for passengers or people working around the airport?

A. Well, they had the usual men's rest room with the usual [16] accouterments of a rest room.

Q. Were the men's and ladies' rest rooms indicated from the lobby or waiting room of the airport?

(Testimony of Joseph P. Hennessey.)

A. The men's rest room was; I don't know about the other one.

Q. Now, on the occasion of your going to take the plane, you say it was in the afternoon?

A. It was in the afternoon, yes, sir.

Q. And approximately——

A. Well, the plane left shortly after two; I don't remember when exactly now, and it was sometime, I would say, between 1:30 and 2:00 o'clock.

Q. All right, and did you have occasion to use any of the facilities that you have testified to on that afternoon?

A. Yes, while waiting for the plane, I went to the rest room and was washing my hands.

Q. Now, were you washing your hands in a lavatory or basin with which this men's toilet room was equipped?

A. Yes, I was.

Q. What is your height?

A. Six feet and one-quarter.

Q. And do you recall the position of these lavatories?

A. I had to reach down to reach into them.

Q. Then, in order to be washing your hands, you would be in what position, somewhat?

A. I would be sort of standing in front of the lavatory, and [17] reaching down into the lavatory.

Q. Now, at that time, was there any other person to your knowledge that was occupying or was in that room with you?

A. There was one other gentleman.

Q. At that time did you know his name?

(Testimony of Joseph P. Hennessey.)

A. I did not.

Q. Can you identify him by subsequently meeting him? A. Yes, sir.

Q. What is his name?

A. His name was Mr. Wright.

Q. Now, then, while you were there bending over washing your hands on that occasion, did anything unusual occur?

A. An object fell from above me and upon me. I later discovered that object to be a man.

Q. And approximately where did the impact occur?

A. Across my right shoulder and small of my back.

Q. Now, you, of course, I presume, were not expecting anything of that kind? A. No, sir.

Q. Were you braced or not? A. No, sir.

Q. What was the effect, if you can recall, of this man striking you—I mean what was the effect of it with respect to the immediate reaction on your part?

A. There was an immediate jar, and he seemed to kind of shake [18] me. I didn't go down, it seemed to shake me and start to crush me.

Q. You didn't fall to the floor?

A. Not completely, no, sir.

Q. After this man had fallen on you in that position, what did you notice right at that time?

A. As I went to brush myself off, why I noticed a catch in my right shoulder.

Q. Will you say whether or not, Mr. Hennessey,

(Testimony of Joseph P. Hennessey.)

right at that time did you consider it a serious matter? A. I did not.

Q. Then, what occurred then immediately after that?

A. The gentleman who was in there with me asked me if I was hurt, and I said, "I don't believe so"; and the fellow that had fallen to the floor asked something, I don't know, and I think I said something like, "It's a good thing you are not any bigger than you are or you would have crushed me," or something like that.

Q. Then at that time did you say anything or mention anything to Mr. Wright or anybody else about your shoulder?

A. I believe it was Mr. Wright that asked me if I was hurt, and I think I said, "I just have a catch in my shoulder."

Q. Then did you report this incident to anybody at the office of the air lines at that time?

A. I believe Mr. Wright and I walked over to the desk in the [19] main part of the building, and I think he reported it to the girl back of the desk.

Q. And was inquiry made at that time as to whether you considered you had been hurt?

A. I don't recall whether there was or not.

Q. Now, will you say whether or not on that occasion you took the plane? A. I did.

Q. And came to your destination at Butte?

A. Yes, sir.

Q. Then when did you next arrive in Billings?

(Testimony of Joseph P. Hennessey.)

A. I stayed in Butte that evening, and late that evening I went to Three Forks, Montana, and I caught the train the next day from Three Forks to Billings.

Q. After getting to Billings, what did you discover with respect to your shoulder?

A. It was sore and stiff and I couldn't lift the arm.

Q. And whom did you consult at that time with respect to treatment for the shoulder?

A. I went to see Dr. Harry Soltero.

Q. Is he the same physician you had consulted at the time of your car accident at Butte?

A. He was, sir.

Q. And did Dr. Soltero treat you for this condition? A. He did. [20]

Q. Did you notice any other trouble after you got back to Billings?

A. I seemed to have pain in my back, but didn't complain much about it.

Q. To what extent, was it all over your back?

A. Just in the small of the back.

Q. Now, did that condition clear?

A. The back did.

Q. The back and shoulder?

A. The back did; the shoulder I don't believe is cleared up even today.

Q. Did the shoulder cause you any disability from performing any of your work around the house, or anything of that sort?

A. It didn't affect me in the office too much out-

(Testimony of Joseph P. Hennessey.)

side of the nuisance and pain of it and the agony of it, I wouldn't say too much, no, sir.

Q. Now, then, you have already related about going to St. Vincent's hospital in the fall of 1949 for an attack of laryngitis? A. Yes, sir.

Q. At that time do you recall how long you were in the hospital?

A. Three or four days, I think.

Q. And then at that time did you come back to your office to work? [21] A. Yes, sir.

Q. Now, then, later on in the latter part of 1949, or the early part of 1950, what was the circumstances regarding this subsequent attack?

A. I seemed, the first part of the year, I seemed to get another cold, and then one day it had come back; my voice was completely gone, and when I left my office at five o'clock, I went to the doctor.

Q. At that time did you consult the Soltero Clinic? A. Yes, sir.

Q. Which doctor did you consult at that time?

A. Dr. R. S. Stokoe.

Q. He is a physician here in Billings, is he?

A. He is, sir.

Q. Were you hospitalized at that time?

A. I was.

Q. Now, do you recall the date you went to the hospital in January?

A. I think it was January 3rd, 1950.

Q. Will you relate to the Court with respect to the hospitalization on January 3rd, 1950, were you confined to your bed?

(Testimony of Joseph P. Hennessey.)

A. I was, except I had bathroom privileges, if I remember.

Q. But during this period from January 3rd, immediately following, about how much of the time did you spend in a recumbent or reclining position? [22]

A. Oh, all of it, except when I went to the bathroom.

Q. Then, what was the progress of this attack of laryngitis or whatever it was you had at that time?

A. It got better, and I believe, I think it was Saturday morning, January 7th, it was pronounced cured.

Q. What happened?

A. Then right after that, I think the doctor told me I could get up and go home.

Q. Did you make arrangements to go home then at that time?

A. As I recall, I believe it was a Saturday, and I didn't want to get down town until after one o'clock, as my office would be closed at one, and I told him I would have lunch in the hospital and then I would go down.

Q. During that morning, then, did something happen?

A. As I was getting ready to go to town, I believe I was partially dressed—I had a room with an adjoining bath—I went into the bath, and I was washing my teeth, I think, and my left leg seemed to go to sleep.

(Testimony of Joseph P. Hennessey.)

Q. What did you do, did you make a report of that then?

A. There was either a nurse or a nurse's aid in the room when I came out, and I told her my left leg was asleep.

Q. Then what was done then at that time?

A. She told me I had been in bed for three days, and it probably was all right, that it would clear up, and I went on back into the [23] bathroom.

Q. What did you next discover?

A. While I was in there, the right one started going asleep. I went back out into the room and told her both legs were asleep.

Q. Then where did this feeling of the leg being asleep, as you say, where did that start?

A. I don't know, it encompassed the whole leg.

Q. What was the extent of it—were you able to stand on your legs at that time?

A. The second time I reported to her, I couldn't stand.

Q. What can you tell us then about the 7th day of January, 1950, with respect to how this developed, from a layman's standpoint?

A. As I recall, I came out of the toilet, both legs were asleep. I started to keel over, and I think—I don't know whether I went down into a chair or onto the side of the bed. They took my clothes off and put me back to bed and sent for the doctor.

Q. And then did the doctor show up then about that time? A. I believe he did, yes, sir.

(Testimony of Joseph P. Hennessey.)

Q. What, if anything, was done at that time?

A. Well, frankly, I don't know, it is not too clear in my mind.

Q. Well, tell us what you do remember next then with respect to this condition that [24] developed

A. Well, I don't know, I have—there is sort of a hazy proposition in there of being stuck with needles and pushed around and I don't know how much of a lapse in time was in there. One morning I noticed I was in bed and that they had the bars up on the bed.

Q. With respect to your person what did you notice what occurred?

A. I noticed I had extreme pain in my legs.

Q. What else did you observe when you came sufficiently to yourself to observe your legs, what did you notice about them?

A. I noticed that the left leg was extremely painful and it was subject to jumping all over, subject to spasms, and I believe the left leg was then under a hood to keep the sheets off of it, or else later they put it under, I am not too sure.

Q. Would the touch of the sheet, would that result in pain in the leg? A. It would, sir.

Q. And the spasms you speak about, what were the nature of those spasms?

A. They would run the whole length of the leg and cause the leg to convulse; it would draw up and drive out of its own volition.

(Testimony of Joseph P. Hennessey.)

Q. During this period of time did you suffer any pain? A. I did.

Q. To what extent? [25]

A. It was extreme.

Q. What would be, or what was the effect then with the pain in your left leg and the reaction in the right leg?

A. By then they had put what they call a foot board into the bottom of the bed, and sometimes when this left leg would become spastic and would feel as if it was going to jump if you touched it, the right leg would be the one that jumped as the spasm went down the left leg, and the right leg would drive into the foot board and the left leg lay stationary.

Q. Did you notice any change in the color of the left and right leg during the time you were able to observe?

A. The left leg was sort of a purplish color.

Q. What with respect to the right?

A. The right leg seemed to be all right.

Q. These spasms that you related, what were the frequency, if any, of those attacks?

A. I would say they were quite frequent.

Q. Quite frequent might be anything in the record.

A. Well, for the first, say for the first two or three months, two months, there would probably be one or two an hour or more.

Q. What would be the extent and lasting of these spasms?

(Testimony of Joseph P. Hennessey.)

A. Some would be of short duration, and some of, say a minute or two, and some would be of longer duration, five or ten minutes. [26]

Q. What was the effect of this condition upon your ability to rest? A. I couldn't rest.

Q. With respect to sleep?

A. I couldn't sleep.

Q. What, if anything, was done from a layman's standpoint that you can relate to the Court in the treatment of this condition?

A. I was given repeated hypoes, and I believe I was given a series of what they call spinal blocks and other things, I guess.

Q. Was there any massaging or manipulations of the leg?

A. The latter part of my stay in the hospital they commenced a course of physiotherapy on my left leg.

Q. During the time in the hospital, did you have any voluntary control over your left leg?

A. No.

Q. Was there anything done about moving the leg at intervals?

A. I believe when they wanted the leg moved that a nurse came in and moved it.

Q. Later on, what, if anything, was done with respect to the treatment of this condition beside the physiotherapy and rubbing and manipulations?

A. While still in the hospital?

Q. Yes. [27]

A. They gave me a series of Buerger exercises.

(Testimony of Joseph P. Hennessey.)

Q. Will you describe those to the Court, please?

A. The Buerger exercise—they have what they call a Buerger board, which seems to me more of a wooden rectangle with a slanting plane toward the body of the patient, they keep putting into the bed, and when the leg is placed upon the board, it will hold it in a diagonal position up from the bed, and with the use of that board, you move the leg from the bed to the board and up to the edge of the back and hang it down, and back to the bed and up onto the bed, in a series like that.

Q. Was that what you have referred to as Buerger exercises?

A. Yes, sir.

Q. Now, how long were you in the hospital that they were giving you the attention that you have described?

A. I believe January, February and March of 1950.

Q. And you left the hospital, then, on or about what date?

A. I believe it was the last of March, 1950.

Q. Then, Mr. Hennessey, at the time you left the hospital, what was the manner of your getting out of the hospital?

A. Well, I got into a wheel chair and they rolled me out to an automobile, and I went to the Northern Hotel. I went into a room at the Northern Hotel; I went out on a wheel chair.

Q. What was the purpose of going from the hospital to the Northern Hotel? [28]

A. Well, I wanted to get out; I was getting

(Testimony of Joseph P. Hennessey.)

kind of tired of the place, and I think I finally talked the doctor into letting me go.

Q. Was the reason for going to the Northern Hotel some facilities for you being able to get around a little bit?

A. It was because it was close to any place I might have to go; it was close to the doctor's office; it was close to the Billings office where I was taking my therapy, and the Northern Hotel had an elevator and telephone service, which I figured I would have to have if I was to be out.

Q. Were you using this as a means of convalescence? A. I was.

Q. How long did you remain under those circumstances at the Northern Hotel?

A. About two months, I believe.

Q. Then besides the wheel chair, what was the means of your getting around?

A. Well, shortly before leaving the hospital, I had been allowed to use crutches for short periods of time. I was learning to use crutches.

Q. Were you continuing to use crutches while you were convalescing at the Northern Hotel?

A. I did, yes, sir.

Q. Can you tell the Court the effect of having your leg down or hanging down? [29]

A. I seemed to have no tolerance, and the blood would rush to the leg, and it would cause it to be acutely discolored and cause a great deal of pain.

Q. For what length of time, approximately, did this condition continue when your leg would be

(Testimony of Joseph P. Hennessey.)

down in a normal position of daytime activity that you suffered this pain? How long did that continue to be that way?

A. Eight or nine months after I got out of the hospital.

Q. What was your method of obtaining relief?

A. If I were in my office, I would put my leg up on the desk so it could be held in a horizontal position, or anywhere else, I would put it up on a chair or anywhere else so long as I got it up into a horizontal position.

Q. Was there any time during the period of time you have related to the Court that you were free from pain? A. No, sir.

Q. And the swelling and change of color in your leg, did that condition continue also?

A. It did.

Q. You mentioned during the course of your testimony that you went to the Billings Clinic?

A. That's right.

Q. What was the purpose of going to the Billings Clinic?

A. They had a therapy tank, a hydrotherapy tank, and I went there to take hydrotherapy and physiotherapy on the leg. [30]

Q. Was that hydro and physiotherapy administered at the clinic? A. It was.

Q. Describe the treatment to the Court?

A. A hydrotherapy tank, it looks like a deep wash tub that is filled with water at, I believe, 110

(Testimony of Joseph P. Hennessey.)

degrees, and it has some type of an air arrangement, or a motor, that causes a whirlpool in this hot water, and your leg is placed in the tank with this water gyrating around in this whirlpool effect.

Q. How long did you continue taking those treatments?

A. For a couple of months, I believe.

Q. Then did you administer—did you use hot water treatments yourself subsequently at home?

A. I soaked it every day, sometimes twice.

Q. Would that be in hot water, also?

A. Yes, as hot as I could stand it.

Q. How long did these treatments continue, Mr. Hennessey, these treatments you have related to the Court?

A. About a year and a half; even today I have to do it.

Q. Will you state to the Court what, if any, progress towards recovery you have observed?

A. Up until about a year and a half ago, I seemed to get gradually better and to get around better, but in the last year I don't notice any progress whatsoever.

Q. What is the present condition of your leg? [31]

A. Well, I have an ankle lock in my left ankle; the toes of my left foot are deformed; the left foot is highly sensitive, and neither leg is worth much so far as walking on them is concerned; they both go haywire.

Testimony of Joseph P. Hennessey.)

Q. What has been your experience in the past year?

A. I can walk about one block; then I get severe cramps deep in the calves of both legs, and I can force myself to walk an additional block, and then I have to sit down, that is all there is to it.

Q. The condition that you have described, is that present with you at the present time?

A. It is, sir.

Q. And in connection with the leg, are you able to keep it down now without the pain you suffered during the first part of this history after you came out of the hospital?

A. The left leg, if I keep it down too long now, gets numb.

Q. What, if anything, can you tell the Court about the symptoms that you have at the present time with respect to the leg?

A. Well, the left leg, I can't, if I sit too long, the left leg bothers me, and if I stand on it too long, it will start to hurt, then it has to be moved. In other words, you can't keep it at any one spot for any too long a time. The right foot is sensitive. If you are walking along and step on something, why it sends a pain up right through the foot. The right ankle, [32] of course, doesn't work.

Q. Are you referring to the left ankle?

A. The left ankle.

Q. Your difficulty is primarily with the left leg and left foot, isn't it?

A. That's right.

(Testimony of Joseph P. Hennessey.)

The Court: You have been sitting there quite awhile so the Court will take a short recess. Court will stand in recess until 11:30.

(Ten-minute recess.)

The Court: Leave is granted to withdraw the witness.

(Witness temporarily withdrawn.) [33]

JOSEPH P. HENNESSEY

the plaintiff, recalled as a witness on his own behalf, being first duly sworn, testified as follows:

Further Direct Examination

By Mr. Doepker:

Q. Now, at the time of the recess, Mr. Hennessey, we were discussing the present condition with respect to your left foot, and what is the circumstances at the present time with respect to the movement of the foot?

A. I can move the foot to the left or right or down, but I can't lift it up.

Q. Can you extend the foot backward?

A. No, sir.

Q. In walking, what arrangements do you have so you can walk with balance?

A. I have a booted shoe on the left foot.

Q. Does it have a spring constructed——

A. Heel.

Q. ——base of heel?

A. Yes, sir.

(Testimony of Joseph P. Hennessey.)

Q. So far as a layman could tell, have you had any trouble with your heart? [35]

A. Not that I know of, sir.

Q. Or have your kidneys caused you any difficulty?

A. Not since the original deal back in 1933.

Q. Since that time have you had any difficulty from a layman's standpoint with your kidneys that you know of?

A. No, sir.

Q. And what has been your weight, as a rule?

A. Well, between 175 to 185 pounds.

Q. And with respect to your lungs, have you ever had, to your knowledge, any trouble with your lungs?

A. I have not.

Q. The difficulty that you have encountered has been confined to the bronchitis, has it, or the hoarseness?

A. Yes, sir.

Mr. Doepker: With your Honor's permission, for the sake of the accommodation of the medical profession, and also so that on this feature of the case that cross-examination may be had, may we withdraw Mr. Hennessey after he has cross-examined as to these matters, and put him on later on the other features of the case?

The Court: Yes—what other features?

Mr. Doepker: The question of damages and so on.

The Court: There is no objection?

Mr. Angland: I see no objection if he is going to restrict it to that. I can't think of any other features. [36]

(Testimony of Joseph P. Hennessey.)

Mr. Doepker: Earning capacity and his work, and how it has interfered with his work and things of that kind.

Mr. Angland: I thought you had already pretty well covered interference with his work.

Mr. Doepker: I don't want to inconvenience the Court.

The Court: Get the doctors on as soon as possible.

Mr. Doepker: One doctor has been called back for examination with the Navy. I don't want to inconvenience the Court too much.

The Court: It is all right with me.

Mr. Angland: I have no objection just so we don't get into matters that might be required for examination of the doctors.

Cross-Examination

By Mr. Angland:

Q. Mr. Hennessey, is this the first time you have filed a lawsuit arising out of this case?

A. No, sir.

Q. Was the nature of any other case you filed the same or different?

A. Well, there was one filed against Western Air Lines arising out of the same incident.

Q. Where did you file an action against the Western Air Lines? [37]

A. Silver Bow County.

Q. In the District of Montana?

A. District Court of Montana.

(Testimony of Joseph P. Hennessey.)

Q. The Second Judicial District?

A. That's right.

Q. I will hand you, Mr. Hennessey, what has been identified as Defendant's Exhibit 3, and ask you to examine it please? A. Yes, sir.

Q. Mr. Hennessey, does that appear to be an accurate record of the proceedings in the District Court of the Second Judicial District of the State of Montana? A. It appears to be.

Q. Of the action that you filed against Western Air Lines? A. It does, sir.

Q. Directing your attention, Mr. Hennessey, to the complaint which you filed in that case, and particularly the allegations of paragraphs—I believe it is paragraph 6, does that paragraph of that complaint begin “that as a proximate result of said negligence”? A. That's right.

Q. Will you read that paragraph of the complaint?

A. (Reading): “That as a proximate result of said negligence of the defendant and its servant who was then and there engaged in the scope of his employment by defendant and for its benefit and of said servant's falling upon the plaintiff, he [38] “was thrown violently to the floor, plaintiff's neck and shoulder were badly wrenched and his back was sprained, the muscles, tissues and tendons of his neck and right shoulder were torn, bruised, contused and made stiff, sore and painful for most of the time since said casualty; the muscles, tissues and tendons of the cervical, dorsal and lumbar

(Testimony of Joseph P. Hennessey.)

spine were strained and the right supraclavicular nerve was crushed, all of which injuries, proximately caused by the negligence of the defendant and its servant has caused the plaintiff to suffer great physical and mental pain and great shock, all of which has impaired the plaintiff's ability to work and follow his occupation to his great damage in the sum of Two Thousand Eight Hundred Fifty Dollars."

Q. Now, will you read the prayer of the complaint?

A. (Reading): "Wherefore, plaintiff prays judgment against defendant for the sum of two thousand nine hundred seventy-five dollars and for his costs herein expended."

Q. Mr. Hennessey, as a matter of fact, you weren't thrown violently to the floor at the time of that accident, were you?

A. No, sir, I was not.

Q. Did you receive hospitalization or medical care, Mr. Hennessey, for tissues and tendons of your neck and right shoulder that were torn?

A. No hospitalization. I received medical care for that shoulder after returning to Billings. [39]

Q. Did anyone treat you other than Dr. Soltero, did you state? A. No, sir.

Q. He is the only one that treated you?

A. He is the only one.

Q. Did you report at the time of this accident, did you yourself report to anyone connected with the air lines that you had been injured?

(Testimony of Joseph P. Hennessey.)

A. I believe I did, Mr. Angland. I believe I walked to the desk with Mr. Wright. He reported the incident that had occurred, and I believe I said I didn't think I was injured.

Q. Do you know who he talked with?

A. No, I don't; it was a young lady back of the desk. I don't know what her name was.

Q. Did you inquire for the airport manager?

A. I did not.

Q. Did you report the matter to the hostess of the air liner after it left for Butte?

A. I did not.

Q. The first you knew you had been injured at all was the next day when you arrived in Butte, is that it?

A. The next day, yes, that's right.

Q. You were in Butte the next day?

A. I was back in Billings the next day.

Q. You were back in Billings the next day, I beg your pardon. [40] Did you consult the doctor then?

A. I did.

Q. How often thereafter did you consult the doctor with reference to this condition of your neck and shoulder, the muscles, tissues and tendons of your neck and right shoulder?

A. I believe I took three diathermy treatments from him on that neck and shoulder.

Q. Over a period of time?

A. It was over, I believe, a period of four days, or maybe a week. It was right in a period of a short period of time.

Q. Immediately following the accident?

(Testimony of Joseph P. Hennessey.)

A. Immediately following the accident, yes.

Q. Did you take any further treatments there-after? A. No.

Q. Those were the last treatments you had?

A. That's right. He told me whenever it became painful it should be rubbed out, it should be massaged.

Q. Mr. Hennessey, did you have any cuts on your face? A. No, sir.

Q. Did you have any treatment for anything other than the shoulder or the neck?

A. That's all.

Q. As you were leaning over the wash basin at the time Mr. Livingston fell through the ceiling, were you pretty well leaned over? [41]

A. Just normal that it would require at my height to reach to that wash basin.

Q. Standing reasonably straight?

A. Approximately. I believe that wash basin would be about as high as that table (indicating), or a little higher.

Q. About that. If the testimony should show in this case that by actual measurement, the wash basin was 30 and $\frac{3}{4}$ inches from the floor, that would be about right? A. I imagine, yes.

Q. Near three feet then? A. That's right.

Q. What degree do you suppose or would you estimate that you might have been leaning over the wash basin, Mr. Hennessey?

A. Frankly, I don't know.

Q. You weren't leaning over 90 degrees?

(Testimony of Joseph P. Hennessey.)

A. No, and I would say probably 30 to 45 degrees.

Q. Between 30 and 45 degrees?

A. That's right.

Q. That is, at the time——

A. At the time of the impact.

Q. ——that Mr. Livingston hit you. Did you have the impression that Mr. Livingston's full weight fell on you, that he hit you squarely?

A. I did.

Q. You didn't have any impression that he brushed by you, or [42] that it was a glancing blow?

A. I would say it was definitely not a glancing blow.

Q. It was a square blow?

A. That's right.

Q. Which basin were you at? There are three basins in that men's room, aren't there?

A. I believe there are, yes.

Q. Which one were you standing at?

A. I am not sure, but I think it was the middle one.

Q. Maybe I can hand you a picture that will help you out. I have some photographs here.

A. I haven't seen the place since that day; I am not familiar with it.

Q. Do you think you might recognize a photo of it if we show it to you? A. I don't know.

Q. Well, I'll hand you, Mr. Hennessey, what has been identified as Defendant's Exhibit 4, and ask

(Testimony of Joseph P. Hennessey.)

you whether or not that appears to accurately portray what it purports to show?

A. I don't know.

Q. You don't know? A. That's right.

Q. Do you recall that there were three wash basins in that men's room? [43]

A. I believe that is right, yes, sir.

Q. You don't know which one of them you were standing at?

A. I think it was the middle one.

Q. Where was Mr. Wright standing?

A. He seemed to be to the right of me, I think, some place. Wherever that paper dispenser was on the wall, I think he was over there.

Q. The paper dispenser, I believe that would be at your left.

A. Then, it would be to the left of me then.

Q. If the evidence in this case should tend to show that the paper dispenser was to the left of the center wash basin rather than to the right, then would you say Mr. Wright was standing to your left?

A. No, I wouldn't, because I have an impression he was standing to my right.

Q. Well, directing your attention to Defendant's Proposed Exhibit 4, if the evidence should tend to show that that is an accurate photograph of the wash basins as they were located in that wash room on June 2nd, 1949, where would you place Mr. Wright in that exhibit? Would you just mark a

(Testimony of Joseph P. Hennessey.)

“W” where you would place Mr. Wright, or write the word “Wright”?

A. It all depends if I am placing myself right here.

Q. We want your memory of the matter.

A. If I were at the second basin, he would be somewhere in this vicinity, somewhere between here and this wall (indicating). [44]

Q. You put an “X” there?

A. I put an “X.”

Q. Just put the name “Wright” under it. Put a mark as to where you were standing as to your best recollection.

(Witness marks exhibit as directed.)

Q. When Mr. Livingston fell on you, Mr. Hennessey, did you have to straighten up to throw him off his back?

A. I don’t believe so, no; I believe he hit my back and fell onto the floor.

Q. He hit your back squarely and fell onto the floor? A. That’s right.

Q. You stated you were not thrown to the floor, but you indicated your legs wobbled and you almost went down? A. That’s right.

Q. Did you tell Mr. Wright or Mr. Livingston that that was the situation?

A. No; I believe the only thing I can recall telling either one of them was telling Mr. Wright that I had that catch in my shoulder as I lifted up

(Testimony of Joseph P. Hennessey.)

to brush myself off, and telling Mr. Livingston it was a good thing he wasn't a larger man.

Q. Did Mr. Livingston appear to be pretty well shaken up? A. I don't recall.

Q. Well, he went clear to the floor, didn't he?

A. That I just don't remember.

Q. It is a reasonably high ceiling? [45]

A. That's right, yes.

Q. I think the evidence in this case will tend to show it is a 12-foot ceiling.

A. That's right.

Q. You don't recall his condition?

A. No, sir.

Q. You recall saying it was a good thing he wasn't a heavier man. Was it treated seriously or with some levity? A. Lightly.

Q. As a matter of fact, you were laughing about it, you and Mr. Wright? A. That's right.

Q. Mr. Livingston didn't take it as lightly as you did?

A. That's right, he took the fall.

Q. You treated it as a joke?

A. I don't know about Mr. Wright; I treated it lightly, yes, sir.

Q. When you came out into the lobby, it was still treated with a good deal of laughter, somewhat of a joke, wasn't it? A. That's right.

Q. Just what part of your back did Mr. Livingston hit, just where did he strike you when he fell?

A. I would say in the small of the back. He seemed to come across me, as I remember the im-

(Testimony of Joseph P. Hennessey.)

pact, with most of his weight up in the shoulder or my neck, but with a glancing [46] blow along the small of my back.

Q. You think most of his weight——

A. Came up in here (indicating).

Q. Like as if I just drop my hand back of the car and right down on the shoulder, you think most of the weight was right about there?

A. That's right, like a little back of your clavicle.

Q. And then from there, he hit you in the small of the back? A. Yes.

Q. Did he push you forward?

A. My feet, I don't believe moved from where they were. I think I might have swayed forward, but so far as pushing my whole body forward, I would say no.

Q. You received no bruises on your face or head? A. No, sir.

Q. Did you strike any object with your face or head when he hit you with his heavy weight right on the shoulder? A. Not that I recall.

Q. You don't recall striking any object?

A. No, sir.

Q. You would recall it if you had?

A. I would think so, but I don't remember anything at this time.

Q. You do recall you consulted a doctor the next day with [47] reference to your shoulder?

A. That's right.

Q. You stated, I believe, Mr. Hennessey, on

(Testimony of Joseph P. Hennessey.)

direct examination that you noticed a catch in your right shoulder when you started to brush yourself off?

A. That's right.

Q. Which shoulder did you have that on?

A. The right shoulder.

Q. The right shoulder? A. That's right.

Q. That just occurred for a minute was it, and then gone?

A. Then it was a momentary catch, that's right, it stiffened up later.

Q. The brushing off was necessary because there was a lot of insulating material that had fallen, and dust and dirt that had come through the ceiling, is that right?

A. That's right.

Q. There weren't any falling objects that were very heavy?

A. Just the first one.

Q. That's right, just Mr. Livingston, he was the only heavy object that fell through that ceiling?

A. That's right.

The Court: We will suspend until two o'clock. Court will stand in recess until two o'clock. [48]

Cross-Examination

(Resumed)

By Mr. Angland:

Q. Mr. Hennessey, when we suspended, I believe we were [49] talking about the accident that occurred down at the airport in Pocatello. I think you stated that you had a catch in your shoulder that just lasted momentarily?

(Testimony of Joseph P. Hennessey.)

A. That's right.

Q. And that was the only pain or anything you suffered at that time? A. That's right.

Q. Mr. Hennessey, did your shoulder, did it become discolored, turn black and blue, anything like that? A. I don't believe it did, no.

Q. No outward appearance that anyone could notice? A. No, sir.

Q. Anything in the small of your back that could be observed upon examination?

A. I don't believe there was, no.

Q. Now going back some years, you testified on direct that you had had some hospitalization in Butte, Montana. When was that?

A. I think it was the winter of 1933.

Q. Do you remember what you were in the hospital for at that time?

A. I believe I was in the hospital for acute pneumonia.

Q. What hospital was that?

A. St. James hospital.

Q. In Butte? [50] A. Yes.

Q. Do you recall approximately how long you were in the hospital on that occasion?

A. As far as I can remember, it was two months.

Q. Were there any complications connected with that hospitalization?

A. There was. I developed acute nephritis.

Q. What is your understanding of acute nephritis?

(Testimony of Joseph P. Hennessey.)

A. It is some type of infection, I guess you would say, of the kidneys.

Q. Did they continue to hospitalize you for that condition after the pneumonia had cleared up?

A. They did, yes.

Q. For how long a period of time?

A. I don't know. I think the nephritis followed immediately on the pneumonia, and I think the period of time for both was two to three months.

Q. Now, in the year 1934, were you hospitalized anywhere?

A. I was trying to think whether or not this pneumonia—it was either late in 1933 or the first part of 1934, but that would be the only hospitalization I have had in either year. Whether it would carry over from one year to the other, I don't know for sure.

Q. Would it help you to examine the chart, your hospital chart from St. James Hospital, to fix the dates and the [51] periods of time in 1933 and 1934?

A. I imagine it would, yes.

Q. We have Miss Shea here from the St. James Hospital in Butte.

A. That's right.

Q. Have you had an opportunity to talk with her about them?

A. I talked to her for a minute, and she reminded me of a short stay I put in the hospital earlier in 1933 that I haven't testified to or described.

Q. What was the nature of that?

(Testimony of Joseph P. Hennessey.)

A. Evidently it was for a bellyache; I was in four or five days.

Q. You don't recall? A. No.

Q. Would you like to look over the chart to refresh your recollection as to how long you were hospitalized and for what condition?

A. Yes.

Q. I will hand you, Mr. Hennessey, the documents that Miss Shea has brought with her from St. James Hospital, and ask you——

The Court: You had better identify them and have them marked.

Mr. Angland: I had better ask the witness to step aside and have Miss Shea come [52] forward. * * *

Q. (By Mr. Angland): I will hand you, Mr. Hennessey, what has been identified as Defendant's Exhibit 5, and ask you to look, please, at that exhibit and see whether or not your memory is refreshed as to the hospitalization you had in the year 1933 in Butte, Montana, at the St. James Hospital. Have you completed your examination for the year 1933, Mr. Hennessey? I thought we might take it chronologically here.

A. I have it, yes, sir, go ahead.

Q. What do you find that the record shows as to hospitalization, medical care, you received at St. James Hospital in 1933, that is, with respect to what the ailment was?

A. It shows a pain in the abdomen, diarrhea and vomiting.

(Testimony of Joseph P. Hennessey.)

Q. And how long a period of time were you in the hospital on that occasion?

A. From August 28th to—July 28th to August 5th, I would say, 7 days.

Q. You didn't have nephritis at that time, is that right? A. No, it says enteritis.

Q. Do you find any notation there to the effect that you had any nephritis at that time?

A. I do not.

Q. Now, as your memory serves you, do you think you had any nephritis in 1933?

A. I would say not, sir. [55]

Q. Well, by referring to the records, will you advise us of the next occasion on which you were hospitalized in St. James Hospital?

A. I would say April 20th, 1934.

Q. What was the ailment that you had at that time? A. Pneumonia.

Q. Was there any complication?

A. Gastritis.

Q. Is there any entry in the record on that occasion to show you had any nephritis?

A. I would say, no.

Q. Now, Mr. Hennessey, when were you released from the hospital on that occasion?

A. June 19th, 1934.

Q. When was the next occasion?

A. June 25th, 1934.

Q. What was the condition then?

A. Acute nephritis.

(Testimony of Joseph P. Hennessey.)

Mr. Doecker: May I have that date again, please?

A. June 25th, 1934.

Q. On that occasion you were hospitalized for how long, Mr. Hennessey?

A. Well, let's see, I was hospitalized until October 20th, 1934.

Q. Mr. Hennessey—— [56]

A. That is four months.

Q. Yes. You recall that treatment, that period of time spent in the hospital quite well, don't you?

A. I can recall it, yes.

Q. What was the condition from the layman's point of view with respect to your abdomen?

A. It was swelled away up.

Q. Yes, as a matter of fact, you had scarring of the abdomen ever since?

A. That's correct.

Q. That is on the outside of the abdomen. You don't know whether there is any scarring on the inside or not?

A. No, I don't know.

Q. Have you ever had any surgery, Mr. Hennessey?

A. No, I have not.

Q. Were you released, did I understand you to say yesterday, from the hospital, as fully cured?

A. No, I didn't say that.

Q. Then, I misunderstood you.

A. No, I was not.

Q. You were not fully cured?

A. No.

Q. You continued to suffer from nephritis after your release from the hospital on that occasion in

(Testimony of Joseph P. Hennessey.)

October, 1934? A. I did. [57]

Q. How long did you continue to suffer from the nephritis?

A. I took treatment for it in the year 1935, and as far as I know, I have no way of determining, I wasn't bothered with it, and had no medical examination, I wasn't bothered with it from, say the end of 1935 on, the beginning of 1936 on.

Q. You never had occasion to think nephritis had ever bother you from that time on?

A. No, I did not.

Q. You stated yesterday you were rejected from military service. Why, if you know, were you rejected?

A. Well, they told me it was because of the history of this acute nephritis. On several occasions I asked them.

Q. You didn't have any clinical examination, you stated on direct?

A. I did when I took these examinations for entrance into the service, yes.

Q. You did have examinations? A. Yes.

Q. Was it by reason of the history of the nephritis, or by reason of the continuing condition?

A. I don't know. What they told me was it was because of the history. I did not see the clinical findings.

Q. Of course, you would be interested in seeing their findings, wouldn't you, Mr. Hennessey?

A. If they would let me see them, yes. [58]

(Testimony of Joseph P. Hennessey.)

Q. Suppose we make available to you, then, the Selective Service record, Mr. Hennessey? I wonder if I might ask the witness to step aside?

The Court: It is not necessary. Mark it and show it to him and get it identified later.

Q. I will hand you, Mr. Hennessey, what has been identified as Defendant's Proposed Exhibit 6——

Mr. Doepker: Your Honor, we object to any evidence in connection with this matter until counsel has had an opportunity to examine it.

Mr. Angland: I am going to hand it to you in just a minute.

The Court: There is no necessity for that. The witness is the one asked to identify it and if he knows what it is.

A. It appears to be a record of Local Draft Board Number 2.

Q. Where?

A. Silver Bow County, Montana.

Q. Is that the Local Board with which you were registered?

A. That's right.

Q. Do you want to look at the documents contained in that folder, Mr. Hennessey, to see whether or not they contain your signature and are in fact the documents with respect to your registration with Local Board Number 2 at Butte, Montana? Does that appear, Mr. Hennessey, to be your record all right?

A. I see my signature in here twice, yes. [59]

Mr. Angland: I might state to the Court and

(Testimony of Joseph P. Hennessey.)

counsel, I don't think it will be necessary to offer the whole record. There is a portion of that exhibit we may offer. It may be necessary to offer it all.

The Court: Unless counsel stipulate, you can't offer it at this time anyway, so let's go on to something else.

Mr. Angland: Very well, let me have the record. Mark this 6-A, a portion of this record. Mr. Hennessey, I will hand you what has been identified as Defendant's Exhibit 6-A, and ask you in whose handwriting that document appears to be?

A. It appears to be mine.

Q. Mr. Hennessey, that is a letter you directed to the Selective Service Board, is it?

A. It is my handwriting.

The Court: Is that a letter you directed to the Selective Service Board?

A. It is a letter to Mr. Briney; I believe he was chairman of the Board at that time, Judge.

Q. It is a letter you directed to the Selective Service Board? A. That's right.

Q. It has to do with your physical condition, doesn't it? A. It does.

Q. Mr. Hennessey, did you send that to the Selective Service Board to assist them in their classification of you under the [60] Selective Service Act?

A. It must have been the reason, yes; I don't recall right now the circumstances around it, but it was sent to them.

Q. Do you know when that letter was sent to

(Testimony of Joseph P. Hennessey.)

the Board? A. There is no date on it.

Q. Well, the Selective Service Act, I believe, was passed in 1940?

A. I believe that's right, yes.

Q. For your information, that letter was attached to a card of the Board dated August 5th, 1941, the next to that letter dated August 28th, 1941. That letter appears to be between those two documents.

A. It would be about that time.

Q. It would be in August of 1941, then?

A. Yes.

Q. After reading that letter, Mr. Hennessey, do you still state to the Court that you did not have nephritis following late 1935 or early 1936?

A. I would say that, according to this letter, that, according to Dr. Childs, who was examiner for the Navy in Seattle, that I had it.

Q. Yes. With respect to your ability to do work, according to the information you received at that time, what was the situation?

A. That I shouldn't do any heavy work. [61]

Q. Then you did have nephritis as late at August, 1941, according to medical advice you received? A. It seems so, yes.

Q. You wish then to change your answer as to not having any nephritis?

A. That's right, yes.

Q. Now, Mr. Hennessey, have you had any medical advice concerning your nephritis since the date you wrote that letter in 1941?

(Testimony of Joseph P. Hennessey.)

A. I have had additional physicals since the date I wrote that letter.

Q. What has been the best medical advice you have received concerning that condition?

A. Well, the recent ones, it doesn't show; I guess once in a while there is a slight show of albumin, but that is the only indication I ever had; for a number of years, I never had any. I would say that probably the best I could say, between, oh, sometime around that period of time up until maybe today, that I probably didn't have it, or sometime after that, I didn't have it.

Q. What is the medical information you have received on that?

A. Up until recently, I hadn't received any medical information for a long time on it.

Q. Up until recently. Are you beginning as of the date of [62] August, 1941, now, until recently?

A. I believe there was additional—I am not sure now, but I think that since then there was an additional military physical examination there, probably in the same year.

Q. Do you wish to look at the Selective Service file to see?

A. If I may; I can't recall now whether there was or not.

Q. Yes, you may.

A. I believe there should be an examination from that Board in Missoula after I had passed in Butte and went to Missoula.

Q. I might call your attention, this Defendant's

(Testimony of Joseph P. Hennessey.)

Exhibit 6-A, or proposed Exhibit 6-A refers to an examination.

A. What I had in mind was after that, I was drafted and I passed in Butte and went to Missoula and to Fort Lewis. I went from Butte to Missoula, and then in Missoula I was re-examined and sent back from there. That is the one I had in mind, but I don't believe it is in here.

Q. You don't think it is here?

A. I don't see it. Anyway, there was one after that.

Q. In any event, you were constantly rejected for military service?

A. That is correct.

Q. That was by reason of your physical condition?

A. That's correct.

Q. You don't recall any medical attention you have received [63] for the nephritis since 1941, since August, 1941?

A. I have taken no treatment for it since 1936.

Q. On how many occasions since August, 1941, if any that you can recall, have doctors advised you of that condition?

A. I don't believe since that last examination that I just referred to that any doctor has advised me of that condition. Right off hand I can't think of any.

Q. Referring to the St. James Hospital record again, after you were released from the hospital on October 20th, 1934, when were you next hospitalized?

A. On April 12th, 1939.

(Testimony of Joseph P. Hennessey.)

Q. What was the reason for the hospitalization on that occasion?

A. (Reading): "The patient was struck in the eye with a handball."

Q. Yes, you were engaged in some sporting activity at that time? A. That's right.

Q. Mr. Hennessey, I think you said that you were not ill from then on on your direct examination, if I recall it correctly, until 1949, I believe, is that right, or was it 1947?

A. I think I stated I got hurt in 1947, didn't it?

Q. Yes, you did, 1947, that's right. You rolled over an automobile in 1947, is that right? [64]

A. That's right, yes.

Q. Who was your doctor on that occasion?

A. Dr. Harry Soltero.

Q. Here in Billings? A. That's right.

Q. What was your condition as a result of the automobile rolling over?

A. I had this stiff shoulder; I couldn't lift it, difficulty in lifting it, pain in the shoulder.

Q. Is that all? A. That's all.

Q. Were you hospitalized for that?

A. No, I was not.

Q. For how long a period of time were you treated?

A. It was just a very short period of time, just two or three treatments, I believe.

Q. Very similar then to the treatment you received in 1949 following the accident at Pocatello?

(Testimony of Joseph P. Hennessey.)

A. The same treatment?

Q. The same treatment? A. Yes.

Q. For about the same length of time?

A. For about the same length of time.

Q. And the shoulder appeared to recover?

A. After about six months or so, it seemed to recover, yes. [65]

Q. In 1947, as a result of that automobile accident?

A. As a result of the automobile accident, yes.

Q. Did you injure your abdomen in any way at that time? A. I had no complaints, no.

Q. Did you injure your lower limbs?

A. No.

Q. You didn't get bruised up?

A. I got some bruises, yes; I don't remember just where they were now.

Q. Can you tell us about some of those bruises, Mr. Hennessey?

A. As I say, the only thing I received treatment for was that shoulder, and that is all I can remember. I must have had some bruises.

Q. But you don't recall where they were?

A. No, I don't.

Q. Any internal injuries of any kind?

A. None that were determined.

Q. Outside of the soreness?

A. That's right.

Q. Your body was pretty well sore all over as a result of the automobile accident?

A. I was limping, yes.

(Testimony of Joseph P. Hennessey.)

Q. You were limping? A. Yes.

Q. Which leg? [66]

A. I bruised this hip up here (indicating), I think, the right one.

Q. The right hip? A. Yes.

Q. Which shoulder? A. Right shoulder.

Q. That is the same one Mr. Livingston struck?

A. That's right, the same one he fell on.

Q. For how long did you continue to limp?

A. I think I continued to limp the day after I got back, just the first day, it was kind of stiff.

Q. You didn't receive any treatment for the injuries to your hip? A. None.

Q. Well, that is in 1947. Then, in 1948, you were in an air line accident, is that right?

A. That's right.

Q. And no injuries whatever?

A. Didn't complain of any.

Q. Of course, I am not interested in whether you complained or not, I am interested in whether or not you had any.

A. So far as I know, I had none.

Q. You didn't do any limping as a result of that accident? A. I did not.

Q. No injuries whatever? [67]

A. I didn't even have a bruise.

Q. It was unnecessary to consult a doctor over that accident?

A. I didn't consult one; I didn't think it was necessary.

(Testimony of Joseph P. Hennessey.)

Q. Now, in 1948, were you hospitalized at all in Billings, Montana?

A. I was hospitalized, oh, I would say a month or six weeks prior to this; it was in the fall of 1948, for acute laryngitis.

Q. Any complications at all on that?

A. I don't think so, no.

Q. In 1949, were you hospitalized here in Billings? A. I was, yes.

Q. Now, I want you to know when I am asking you about hospitalization, Mr. Hennessey, we have the hospital records from St. Vincents.

A. I want you to know all of them, too.

Q. I don't want you to give any mistaken answers. You are aware of your right to have the exhibits? A. That's right, yes.

Q. What hospitalization, if any, did you receive in 1949?

A. Maybe I got the dates mixed up, 1947 and 1948—I wasn't in the hospital in 1948 at all. In the fall of 1949 was this—the fall of 1949 that I had this acute attack of laryngitis, and in the spring of 1950 that I went into the hospital and later developed this. [68]

Q. You didn't have any hospitalization, then, here in Billings in 1947, 1948 and 1949, save for the laryngitis in late 1949, is that right?

A. I didn't have any anywhere; that was it.

Q. What was that?

A. I didn't have any anywhere; that was it.

(Testimony of Joseph P. Hennessey.)

Q. That was it? A. Yes.

Q. And then the next occasion on which you were hospitalized is when you went into the hospital on January 3rd, 1950? A. That's right.

Q. The hospitalization at that time was for what?

A. Well, a recurrence of this laryngitis.

Q. I think possibly the hospital record shows more than that on it, Mr. Hennessey, if you would like to refer to this record.

A. Which one? This big one?

Q. Yes.

The Court: What exhibit is that?

Q. Defendant's Exhibit Number 2, if you will refer to that exhibit. A. Go ahead.

Q. Wasn't there a respiratory infection in addition to the laryngitis when you were admitted to the hospital in January 3rd, 1950?

A. Bronchopneumonia.

Q. It wasn't laryngitis then, it was pneumonia?

A. That's right.

Q. And you were sufficiently recovered on January 7th that the doctor was going to release you?

A. That was right.

Q. And that was the occasion on which you developed this blood clot? A. That's right.

Q. You remained then in the hospital for treatment until April, was it?

A. March, wasn't it?

Q. I forget.

A. I think it was March; I think it was March 12th.

(Testimony of Joseph P. Hennessey.)

Q. March 12th you were released?

A. Yes.

Q. Have you been hospitalized since that time, Mr. Hennessey?

A. I have.

Q. What is the next occasion on which you were hospitalized?

Mr. Doepker: I believe this is improper cross-examination, your Honor. We object to it on that account. Anything that occurs since the hospitalization in 1950 would not be material unless there was some pleading on the part of the defendant alleging that his condition of disability resulted from something other than the condition that developed in January, 1950, and the hospitalization that occurred at that time. [70]

Mr. Angland: May I be heard for just a minute, your Honor? I am unable to understand counsel in that regard. Counsel, on his direct examination, went into the witness' present condition; he has brought him right up to date. I think if we are going to show his condition as of this date for consideration by the Court that the Court is entitled to know of any conditions that have developed between the date of that hospitalization and the present time.

The Court: Obviously. I never heard of anything—do you have any authority for your position, Mr. Doepker?

Mr. Doepker: For the position it is necessary to plead?

The Court: To plead, yes. Doesn't a general

(Testimony of Joseph P. Hennessey.)

denial—under a general denial can't he show what his condition is and what it resulted from?

Mr. Doepker: I don't think so, your Honor, on anything subsequent.

The Court: Do you have any authority for that position?

Mr. Angland: It would amount to shutting cross-examination off.

The Court: You would never be able to inquire as to what his present condition is, in any event, and we would not be able to fix damages if you couldn't find what his present condition is, and that it results from the condition you allege it results from.

Mr. Doepker: That is true, your Honor. My position is [71] if there is anything that has affected his condition subsequent to 1950, something that happened subsequent to 1950, if it is the contention of the defendant that something happened subsequently that is responsible for his present condition, it should have been pleaded.

The Court: I don't understand it that way. Do you have any authority for that? In any event, I will reserve ruling so your point can be taken care of, and you can give me authorities later. Proceed with the examination.

Q. Do you recall the question, Mr. Hennessey?

A. Read the question, please, Mr. Reporter.

(Question read back by Reporter as follows:

“What is the next occasion on which you were hospitalized?”)

(Testimony of Joseph P. Hennessey.)

Q. You may have the hospital records.

A. Yes. Looking at the two hospital records, the Deaconess and St. Vincent's, Defendant's Proposed Exhibits Number 2, I believe, is one, 1 and 2, aren't they?

Q. Defendant's Proposed Exhibits Numbers 1 and 2, yes.

A. You have already covered this 11-29-49, haven't you, this acute laryngitis?

Q. That was acute laryngitis. I think you told us about that, yes. You were hospitalized on that occasion at the Deaconess Hospital, is that right?

A. That's right. I believe the next one would be on November 14th, 1950. [72]

Q. November 14th, 1950? A. Yes.

Q. Then, you were not hospitalized between the latter part of March, 1950, and November, 1950?

A. No, sir.

Q. What was the reason for your hospitalization in November, 1950?

Mr. Doepker: Just a minute now, your Honor, we desire to renew our objection, and call your Honor's attention—we have furnished your Honor with a trial brief?

The Court: Yes.

Mr. Doepker: I call your Honor's attention to page 10, starting in the middle of the page with "Pleading Affirmative Defenses," and Barron and Holtzoff's Federal Practice and Procedure, Section 279, at page 499.

(Testimony of Joseph P. Hennessey.)

Mr. Angland: Your Honor——

The Court: I will reserve ruling.

Mr. Angland: ——this is shutting off cross-examination on the direct.

The Court: Proceed, I will reserve ruling. Answer the question.

A. Alcoholic poisoning.

Q. Mr. Hennessey, how long were you hospitalized on that occasion? A. Seven days. [73]

Q. Mr. Hennessey, did you experience any falls that you recall prior to your hospitalization on that occasion, or during your hospitalization?

A. Right offhand, I can't think of any, no.

Q. You don't recall any bruising or anything of that kind that you received?

A. I think at the time—I don't know, I might have; I could very easily have slipped and had bruises from walking on those crutches. Whether I did or not—I was on crutches all that time—I just don't know. There might be something in there that would show it; I can't find it.

Q. On that occasion, Mr. Hennessey, you were in the Deaconess Hospital at Billings, Montana, is that right? A. That's right.

Mr. Doepker: Deaconess?

A. Deaconess, yes, sir—no, this is St. Vincent's.

Q. That is St. Vincent's?

A. St. Vincent's, yes.

Q. Mr. Hennessey, were you hospitalized again in 1950 after your release on that occasion at either hospital? A. No, sir.

(Testimony of Joseph P. Hennessey.)

Q. Were you hospitalized in 1951?

Mr. Doepker: Just a minute, your Honor, we just want to save the record.

The Court: You can save your objection to this, and I will [74] reserve ruling on it; answer the question.

A. I was, yes.

Q. When were you hospitalized in 1951?

A. September 7th, 1951.

Q. What were you hospitalized for on that occasion?

A. Cerebral concussion.

Q. Do you recall what caused the cerebral concussion in September, 1951, Mr. Hennessey?

A. Yes, I had been hit with an object in the front of my head.

Q. Where did this accident occur?

A. At my office.

Mr. Hennessey: Just a minute, to which we object. The witness has testified to the fact he was hit in the head, and it is immaterial why, how, or where the accident occurred.

The Court: It might be immaterial why, but how is a different matter. We will have to find out what kind of a blow it was, what treatment he received for it, what effect it has upon his condition. You don't have to inquire why he was hit.

Q. However, I want to know what he was hit with. What object were you hit with?

A. I was hit with a telephone.

Q. The blow was sufficient that you——

A. I had a concussion.

(Testimony of Joseph P. Hennessey.)

Q. Who was your doctor on that occasion? [75]

A. R. S. Stokoe.

Q. Was Dr. Stokoe your doctor on all these other occasions? A. He was, yes, sir.

Q. For how long a period of time were you hospitalized on that occasion?

A. Three weeks.

Q. Were there any other complications on that occasion?

A. That is all that show on this chart; that is all there were.

(Ten-minute recess.)

Q. Well, what was the last hospitalization you were testifying about, Mr. Hennessey?

A. That was the one—it was concussion in October, ended the first day of October, 1951.

Q. Did you continue to receive medical treatment for that condition after your release from the hospital?

A. I believe I took the next month off and that was all.

Q. You took the next month off by reason of the concussion? A. That's right.

Q. Have you had any other hospitalization since that time? A. I have not.

Q. Have you received medical treatment since that time for any condition other than the leg that has bothered you by reason of the blood clot?

A. No, I haven't. [76]

Q. Did you, other than the hospitalization, re-

(Testimony of Joseph P. Hennessey.)

ceive medical treatment for any condition other than the condition which occurred on January 7th, 1950?

A. You mean anything other than the concussion?

Q. Excluding the hospitalization you have received, have you received medical attention for any other condition during the period of time from your release from the hospital the latter part of March, 1950, until the present time?

A. I don't believe so, no.

Q. You haven't had occasion to consult with any doctor?

A. No, sir.

Mr. Angland: That is all.

Redirect Examination

By Mr. Doepker:

Q. Were you examined by Dr. Allard?

A. I was, yes.

Q. Were you examined by any other doctors?

A. No, sir—oh, yes, I was by Dr. Horst in Butte.

The Court: That is with reference to preparation for trial of this action, those examinations?

Mr. Doepker: That's right.

Mr. Angland: That isn't treatment otherwise?

A. No.

Mr. Angland: I might ask one question on that: When was [77] he examined by Dr. Horst?

A. I was examined by Dr. Horst—I had two examinations by Dr. Horst. I had one last Satur-

(Testimony of Joseph P. Hennessey.)

day, and I had one on the 26th of December, I believe it was.

The Court: That was last December?

A. Last December, yes, sir.

Mr. Doepker: Your Honor, I have doctors waiting here, and there is just a few matters I want to take up with him. Could I take those up after I use the doctors? They have been waiting here since yesterday morning.

The Court: It is agreeable with me. Do you have any objection?

Mr. Angland: I have no objection.

The Court: Very well, we would like to accommodate the doctors if we can.

Mr. Angland: I see no objection, as counsel stated yesterday, so long as he don't go into matters with this witness that might be matters we want to go into with the doctors. That is the only restriction I suggest at all.

The Court: Very well.

(Witness temporarily excused.) [78]

JOSEPH P. HENNESSEY

plaintiff, recalled as a witness in his own behalf, having previously been sworn, testified as follows.

Direct Examination

By Mr. Doepker:

Q. You are the same Joseph P. Hennessey who has previously testified in this case?

A. I am, sir.

(Testimony of Joseph P. Hennessey.)

Q. Prior to the year 1949—I should say prior to the year 1950, what was your business or occupation here in Billings?

A. I was practicing as an attorney here in Billings.

Q. What was the nature of your practice?

A. It consisted mostly of court work and general trial practice.

Q. In following your profession in Billings, what was your experience with regard to your volume of business prior to the year 1950? [377]

A. Well, in the years prior to that, it had been gradually increasing.

Q. And in the year 1950, what was generally the difference between the time that you could apply to your business compared to previous years?

A. In the year 1950, I wouldn't say I devoted over 20 per cent, any time, to my business in comparison to other years.

Q. In doing your work as an attorney, what was it necessary for you to do in connection with preparation of your cases?

A. I had to do all my own investigative work, my outside contact with witnesses, and gathering evidence, my appearances in court; all that work was done by myself.

Q. Were you, during the year 1950, able to attend or get into the court rooms at all?

A. No, sir, I was not.

Q. When did you next start to be able to get

(Testimony of Joseph P. Hennessey.)

into the court rooms in Billings here subsequent to this episode at the Deaconess Hospital?

A. I tried it the first of 1951 and found out I couldn't do it, and I don't believe I really returned to practice until the first part of 1952.

Q. During the time that you were practicing in Billings prior to the year 1950, what was your net earnings, approximately?

A. Oh, in the neighborhood of \$5,000.

Q. What was your experience in the year [378] 1950?

A. The year 1950, I made about \$4,600.

Q. And did you have any hold over business?

A. That was practically all hold over business.

Q. What was your experience in the year 1951?

A. I made \$2,000.

Q. What has been your experience after you resumed practice in 1952?

A. It has gone up, it started to increase again to about \$3,500.

Q. Now, Mr. Hennessey, just briefly relate what was the reason that you could not attend and practice in court during the time that we have been talking about, 1950 and 1951?

A. Well, all of the year 1950, after getting out of the hospital, I was on crutches, and I had no tolerance in my left leg, so my movement, even on the crutches, was extremely limited, and I was required to take long periods of rest when I couldn't go anywhere at all, even in the latter part of that

(Testimony of Joseph P. Hennessey.)

year. As a result, I couldn't go out and investigate a case; I couldn't even go near the courthouse.

Q. At the present time are you able to use this left leg? A. Very limited.

Q. I was going to finish my question—in order to do the ordinary walking around?

A. No, sir.

Q. How much of a walk do you usually stand on this left leg? [379]

A. Well, the maximum, two to two and a half blocks.

Q. And from the standpoint of arriving at any expense of any kind, or anything of that sort, what methods have you used to get to places you want to go in your business?

A. If I go from my office to the courthouse on any given day, I take a taxicab; when I leave the courthouse, I take a taxicab back to my office.

Q. Is that also true with the investigation of any case in which you have to interview witnesses?

A. If I go to interview witnesses, I take a taxicab or have someone drive me out. I return by cab, or if the witness will take me back, I have him drive me back.

Q. There has been some evidence here concerning your partaking of alcoholic liquor. Explain to the Court what that consisted of during the period of the year 1949?

A. I would say subsequent to the year 1949, that as a whole I drank moderately.

(Testimony of Joseph P. Hennessey.)

Q. And after this incident at the Deaconess Hospital, what was the circumstances?

A. There were periods when I drank excessively.

Q. For what reason, if you had any; if not, why, we will let the fact stand?

A. Because of the pain in the leg. It was either a case of drinking something to kill the pain or take a lot of dope, so I drank a lot of whiskey. [380]

Q. To what extent has that pain subsided at the present time?

A. I still have the pain at the present time. It is not as severe as it was during those two years.

Q. After you left the Deaconess Hospital, Mr. Hennessey, where did you first go?

A. On leaving the Deaconess Hospital, I went to the Northern Hotel.

Q. During that period of time did you maintain a home here in Billings? A. I did.

Q. Why didn't you use your home?

A. It was necessary upon leaving the hospital to have a place that had elevator service in it and had a telephone, and where people could be immediately available in case something went wrong.

Q. How long did you use this Northern Hotel as a convalescent hospital?

A. From that day I left the hospital, the balance of the month of March, all that month of April, I believe, to the 11th of May.

Q. That room alone, what did that cost you?

A. Four dollars a day.

Q. What is your present age?

(Testimony of Joseph P. Hennessey.)

A. 36, the 17th of January.

Q. I believe you testified that you also, as part of your [381] treatment of this leg, took some physiotherapy at the Billings Clinic. Did you testify to that?

A. I did; I took physiotherapy and hydrotherapy, both, at the Billings Clinic.

Q. Did you pay them the going price, the rates they were asking, for those services here in Billings?

A. I did.

Q. What did that cost you?

A. My total for service rendered by them after leaving the hospital was \$136.

Q. As part of your cross-examination, you were referred to a record in the District Court of the Second Judicial District of the State of Montana, attention being called to a complaint in that case. I am speaking of the case in the Second Judicial District. Will you explain to the Court how that case was prepared?

A. I had discussed the case with you as the attorney, and about the time this case was filed, I had called you and told you my shoulder hadn't gotten any better and my back was bothering me a little, and told you to go ahead and file it.

Q. Were you present when the complaint was filed, or prepared by me in your absence?

A. It was prepared by you in my absence.

Q. You were in Billings, and I was in Butte?

A. That is correct. [382]

(Testimony of Joseph P. Hennessey.)

Q. Do you know how it came about that this case was dismissed, how it came about?

A. I believe it was discovered in the course of additional investigation that the workman involved, in place of working for the Air Lines, was an employee of the Government.

Q. The case was then dismissed without prejudice?

A. That's right.

Mr. Doepker: That is all.

Mr. Angland: No cross-examination.

(Witness excused.)

The Court: Call the next witness.

Mr. Doepker: Your Honor, we offer the American Experience Table of Mortality. Your Honor, I believe, will take judicial notice of that. The life expectancy of a man 36 years—is that your age—36 years of age, he has a life expectancy, according to the American Experience of Mortality, of 31.07 years.

Mr. Angland: I have no objection to that, your Honor.

The Court: Very well. [383]

HARRY R. SOLTERO

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [78]

Direct Examination

By Mr. Doepker:

Q. Will you please state your name?

A. Harry R. Soltero.

Q. What is your business, occupation, or profession? A. Physician and surgeon.

Q. Are you duly licensed to practice your profession in the State of Montana? A. Yes.

Q. Are you practicing your profession in the State of Montana at the present time?

A. Yes.

Q. Have you been practicing in the City of Billings for some time? A. Yes.

Q. For how many years have you been practicing in Billings? A. Since 1946.

Q. You are a graduate of what school of medicine?

A. Marquette University School of Medicine.

Q. What year did you graduate? A. 1943.

Q. After that, did you take an internship?

A. Yes, St. Agnes Hospital, Fond du Lac, Wisconsin.

Mr. Angland: As I stated, I will admit the doctor's qualifications. [79]

The Court: He may be qualifying him specially.

Mr. Doepker: I don't think there is anything

(Testimony of Harry R. Soltero.)

further necessary if they admit his qualifications as a physician and surgeon.

The Court: Very well.

Q. Doctor, did you have occasion to have as a patient one Joseph P. Hennessey during the time you have been practicing in Billings?

A. Yes.

Q. During the year 1947 did he ask your advice or treatment in connection with something?

A. Yes.

Q. What was that?

A. He came into my office complaining of pain in his right shoulder and stated he had been in an automobile accident, and he thought he might have done some serious injury to his shoulder. Upon examination at that time, it showed considerable tenderness over the shoulder area; he was unable to raise his right arm above the normal limits of motion because of pain, and at that time I fluoroscoped him. In the fluoroscope, I was looking for a possible dislocation or fracture and was unable to find one, and my diagnosis at that time was a supraclavicular neuritis, a secondary injury previously, at this time, and I treated him with some heat under the form of diathermy, which seemed to relieve him considerably. [80]

Q. He was treated for what period of time in 1947, Doctor?

A. Well, it was improving when I discharged him, and I told him at the time that I thought he would probably have trouble for a possible six

(Testimony of Harry R. Soltero.)

months' period, I wasn't sure, but if he had any more trouble to let me know.

Q. That was the extent of the treatment then in 1947? A. Yes, that's right.

Q. You have, during this period of time, you have seen Mr. Hennessey, visited along with him in Billings, have you?

A. Yes, I have seen him after that.

Q. So far as you know, Doctor, did he appear to recover from that condition you have related?

A. Yes, he didn't complain any more of it.

Q. Subsequently, did you again have occasion to treat Mr. Hennessey in the year 1949?

A. Yes, sir; he came into my office stating that he had been in an airport, and that someone had fallen through a roof on him, or a ceiling.

Q. And at that time, Doctor, with that history, what did you discover? Did you make a physical examination of him?

A. His chief complaint at that time was again—I examined him—pain in his right shoulder, and I re-examined the shoulder to see if he had possibly broken it at that time, or dislocated it, and I didn't locate any fractures or dislocations, and I made the same diagnosis as an aggravated [81] condition, since I knew that he had previously this neuritis before.

Q. And on this second occasion, did you find any nerve damage?

A. Yes, the same nerve, I diagnosed the same

(Testimony of Harry R. Soltero.)

condition, supraclavicular neuritis on the right side.

Q. Did you treat him then at that time for that condition?

A. Yes, we put him under the same form of treatment, giving him some heat, and under the same stipulation that if it got any worse, we would have to continue one, but it seemed to improve and get better.

Q. The condition did improve, did it?

A. Yes. He sometimes would have some pain, and it didn't get any worse, and I saw no need for further treatment.

Q. What have you to say as to this condition of the shoulder at the present time, or the last opportunity you had to examine him, if you will relate when that was?

A. I believe that last time I examined that shoulder would be some time in 1949 shortly after that, and he used to say he still had some pain in his shoulder, but nothing unusual.

Q. At that time you found no fractures or dislocations, is that right?

A. That's right.

Q. And then are you also a member of the Soltero Clinic with Dr. Stokoe?

A. Yes. [82]

Q. You knew that Dr. Stokoe was treating him later then in that fall, 1949, did you not?

A. Yes, I knew he had him in the hospital.

Q. That he had been in the hospital?

A. Yes, that he had been in the hospital.

Q. With regard to your knowledge of Mr. Hen-

(Testimony of Harry R. Soltero.)

nessey in the period during 1947, 1948 and 1949, did you, in your treatment of him, observe anything wrong in the way of his general health, except these two times you have indicated when he had damage to his shoulder?

A. No; his general health seemed good, and I do recall that on one occasion I had been kidding him about scars on his abdomen, and he said that he had had this nephritis years ago, but I did not examine him for that.

Q. You didn't make any examination for it?

A. No; he just told me about it and I just ignored it.

Q. He didn't make any complaints about it?

A. No.

Q. Your clinic has been his family physician, has it not, during the time he has been here in Billings, to your knowledge?

A. To my knowledge, that's right.

Q. Do you know of any complaints during the years 1947, 1948 and 1949, other than what you have alluded to, from your own attention to Mr. Hennessey?

A. No, none brought to my attention. [83]

Mr. Doecker: You may inquire.

(Testimony of Harry R. Soltero.)

Cross-Examination

By Mr. Angland:

Q. Dr. Soltero, I think possibly counsel mis-spoke. He said you knew of Dr. Stokoe's treatment of the shoulder in the fall of 1949. Your response was that you knew he was hospitalized in the fall of 1949.

A. I didn't mean particularly when he was hospitalized and so forth. I don't recall the dates he was hospitalized, but at times Dr. Stokoe said he had Mr. Hennessey in the hospital, or that he was treating him. I didn't pay much attention to it.

Q. Do you know what he was in the hospital for in the fall of 1949?

A. If I could see the chart.

The Court: What difference does it make?

Mr. Angland: I thought being a member of the clinic he might have made some records or treated him.

A. No, he was Dr. Stokoe's patient.

Q. Then, in the fall of 1949, when he was in there for laryngitis, you didn't know about that at all?

A. I don't remember nothing specifically. We commonly do that between us, say we have so and so in the hospital, and unless we are specifically called in, we don't consult with [84] each other.

Q. Mr. Doepker asked you about having seen Mr. Hennessey around and visited around with him

(Testimony of Harry R. Soltero.)

from time to time since you treated him in 1947 as a result of the injury to the right shoulder. You further stated that his general health has been good, Doctor?

A. At that time.

Q. At that time. Now, which particular time do you mean?

A. Well, what I meant, although he specifically had trouble with his shoulder, his general medical condition was good at the time I first examined him. In other words, he wasn't what we considered ill; he was able to walk; he was able to get around.

The Court: Is that all you mean by having good health is that a person is able to walk around? In other words, you didn't examine him to determine what his real health was; he just appeared to be good?

A. He just appeared to be good.

The Court: He appeared to you the same as anybody else. This is not a medical opinion you are giving as to the state of his health?

A. Of course you do a general examination——

The Court: Did you give him a general examination?

A. Yes, the heart, lungs, and so forth, at the time of——

The Court: Tell us what your examinations were and what they [85] showed?

Q. (By Mr. Angland): When was that you gave him the general examination?

A. When he was in the hospital—at the time, of

(Testimony of Harry R. Soltero.)

course, I gave him the examination under the fluoroscope.

The Court: Was he in the hospital at any time with the shoulder complaints? That is all you testified to.

A. No.

The Court: You did attend him otherwise than in the hospital?

A. Yes.

The Court: Then, you didn't make any examinations?

A. It depends upon what you call an examination, Judge.

The Court: I want to find out what you call an examination.

A. I can look at a man and examine him. I have that ability as a doctor, just to look at him and examine him, look at him and examine him with my eyes.

The Court: That is the kind of an examination you gave him?

A. I examined his shoulder; I obviously examined his heart and lungs under the fluoroscope. We call that a general examination from what we call visual. Then there is examinations from actually putting your hands on him and examining him, also from a physical examination standpoint. I didn't go into a lot of detail.

Q. (By Mr. Angland): In other words, Doctor, not going into a lot of detail, you were restricting

(Testimony of Harry R. Soltero.)

pretty much your [86] examination to the shoulder condition, isn't that what it amounts to?

A. That's right, that was the primary examination.

Q. You were concerned about the soreness in the right shoulder? A. That's right.

Q. You didn't go over the rest of the abdomen or body to see whether there was anything wrong with him, is that right? A. No, I didn't.

Q. If he was suffering from an internal ailment of some kind, he didn't complain to you about it, and you didn't explore that possibility?

A. That's right, he didn't complain of anything at the time.

Q. That is what I mean, Doctor. You gave him some therapy treatments, I believe you said, for the right shoulder and told him it might bother him for a period of six months, is that right?

A. That I thought it might, yes, sir.

The Court: That was in 1947?

A. 1947 and also in 1949.

Q. And in 1949? A. Yes.

Q. Did you treat the shoulder in 1949?

A. Yes, I gave him some more diathermy treatments.

Q. You gave him some diathermy treatments in 1949. Do you know when that was, now, in [87] 1949?

A. It was in the summer, but for certain I don't recall the exact month; it might have been around June, I believe.

(Testimony of Harry R. Soltero.)

Q. It might have been. Could you tell from checking your records, Doctor?

A. No, I don't particularly have any records on Joe's case because Joe used to come in and talk to me on other matters at that time, and I don't have any physical examination record, or haven't been able to find it.

Q. He came in to talk to you about other matters?

A. From time to time. He was in from time to time at other times.

Q. Well, now, as you have known him, you have stated on direct, seen him around town, visited with him from time to time, did he follow your instructions as to the care he should give himself following your treatment of him in 1949?

A. I don't know.

Q. Well, to the best of your knowledge, from your observation of him, and what you saw of him, Doctor, did he follow your instructions?

A. During the time I specifically saw him, for the first few days, he followed my instructions. From then on, I don't know.

Q. Did you see him around and visit with him from time to time thereafter?

A. I may have, I don't remember. [88]

Q. Did he appear to be following your instructions?

A. He didn't complain any more of his shoulder, I know that.

Q. Doctor, sometimes we get into an embar-

(Testimony of Harry R. Soltero.)

assing position. I am not trying to embarrass you. It is necessary to just give the Court the fact, that is what I am trying to get at. You did visit with him from time to time, you did see him about Billings, didn't you?

A. You are trying to stipulate that in a certain period of time that I don't remember.

Q. Following your treatment of him in 1949.

A. In 1949, that's right.

Q. You gave him some diathermy treatments. After you gave him those treatments, Doctor, did you observe him visiting in your office or in and about Billings on different occasions?

A. I don't recall about the times I saw him. I do specifically remember seeing him once in the hospital with Dr. Stokoe after that.

Q. Is that the only time you saw Mr. Hennessey between the time you quit treating him from the shoulder in 1949, the next time you saw him in the hospital with Dr. Stokoe, when Dr. Stokoe had him as a patient, is that the situation?

A. I probably saw him; I don't remember specific times.

Q. There is a period of time—the evidence in this case tends to show that he received the injury in Pocatello on June 2nd, 1949, and that Dr. Stokoe had Mr. Hennessey in the hospital [89] in November, 1949, I believe it was. Now, did you see Mr. Hennessey at your office visiting with him, or elsewhere in and about Billings between those times, as to your best recollection?

(Testimony of Harry R. Soltero.)

A. To the best of my knowledge, I don't believe so.

Q. You don't think you did?

A. I don't think so; I cannot remember any specific occasions until I saw him in the hospital with Dr. Stokoe.

Q. That is the occasion in 1949 when he had laryngitis?

A. No, I don't remember that time; I do recall the time he had the problem with the foot. I do recall that I was quite surprised it happened.

Q. That was in January, 1950?

A. 1950, yes.

Q. To the best of your recollection you did not visit with Mr. Hennessey or see him in and about Billings between June of 1949 and January, 1950?

A. I don't recall.

Q. If you did see him, Doctor, he didn't register any complaint to you about his shoulder condition?

A. That's right, because if he had registered a complaint, I think I would have remembered of having seen him.

Q. He didn't return then after you gave him, as you state, I believe, two or three diathermy treatments; he didn't come back for further [90] treatments?

A. He didn't come back and complain of any further things.

Q. As a result of that shoulder injury, and you told him it might bother him for a period of six months, I presume you recommended to him he

(Testimony of Harry R. Soltero.)

take care of himself during that time to not aggravate that condition in any manner?

A. I believe I told him about what it would do, and I probably very likely did tell him to take care of himself.

Q. You don't remember whether he followed your instructions in that regard or not?

A. I gave him no specific instructions.

Mr. Angland: That is all.

Redirect Examination

By Mr. Doepker:

Mr. Doepker: May I inquire a question I overlooked, your Honor?

The Court: Yes.

Q. Dr. Solter, confining your answer to the services that you rendered Joseph P. Hennessey after June 2nd on, with respect to this incident you have testified to when the man fell on him or reinjured his right shoulder, what was the reasonable value of the services which you rendered to him in that connection in the year 1949, and the summer of 1949?

A. You mean just for that specific instance?

Q. That specific part, yes. [91]

A. It was approximately \$12.

Q. \$12, that is all.

Mr. Angland: That is all.

The Court: You may be excused, Doctor. Does he have to remain, or may he be excused?

Mr. Doepker: We would like to have him excused.

The Court: Is that agreeable?

Mr. Angland: Subject to recall if something develops in the case.

The Court: Very well.

(Witness excused.) [92]

DEPOSITION OF FAY R. LIVINGSTON
having been by me first duly sworn to tell the truth,
the whole truth and nothing but the truth, upon
examination, deposed and testified as follows:

Direct Examination

By Mr. Doepker:

Q. Will you please tell us your name, sir?

A. Fay R. Livingston.

Q. And you reside, where, sir.

A. 356 Fairmont. That is in Alameda.

Q. Close to, or in, Pocatello, is it?

A. Yes, sir.

Q. In Pocatello? [44*] A. Yes, sir.

Q. How long have you resided in Pocatello, or around Pocatello, Mr. Livingston?

A. Very near—a little over six years.

Q. You then resided in and around Pocatello on June 2nd, 1949? A. Yes, sir.

Q. And on the second day of June, 1949, by whom were you employed?

*Page numbering appearing on page of original Reporter's Transcript of Record.

(Deposition of Fay R. Livingston.)

A. By the United States Weather Bureau.

Q. And what were your hours of duty on that day?

A. Eight in the morning until four thirty.

Q. From eight in the morning until four thirty in the afternoon?

A. Yes, sir.

Q. Now, on the second of June, 1949, what particular work were you doing for your employer, the Weather Bureau, the United States Weather Bureau?

A. Well, the regular work of taking observations, weather observations, and making maps, plotting radio sound observations.

Q. Where was the United States Weather Bureau located with reference to the terminal building at the Phillips Field on the second of June, 1949? [45]

A. Well, it is in the west end—the northwest end of the administrative building.

Q. Was the Weather Bureau in approximately the same location in that building at that time as it is at the present time?

A. Yes, sir.

Q. Entering the terminal building, or the administration building at Phillips Field at Pocatello, or near Pocatello, would you come into an area that is called the lobby of that building, a waiting room?

A. Well, that would depend on which door you came in. If you came in—there are about four entrances, two of which come into the lobby.

Q. Is there an independent entrance from the

(Deposition of Fay R. Livingston.)

outside into your department, or the department of the United States Weather Bureau?

A. Yes, sir.

Q. And where does that entrance come in from?

A. It is on the northwest side.

Q. The northwest side? A. Yes, sir.

Q. Do you remember whether the floor of the U. S. Weather Bureau rooms in that building was about on the same level as the lobby floor on the second of June, 1949? [46] A. Yes, sir.

Q. It was? A. Yes, sir.

Q. In connection with your employment did you have occasion on the second of June, 1949, to use a room that has been referred to here as the theodolite room? A. Yes, sir.

Q. And how would you get to that room from the main quarters of the U. S. Weather Bureau on that day?

A. Well, there is a door on what we might call the west end of our quarters into a hall, and in this hall is stairs leading up on top of the cement vault, and from the cement vault is another short stairs leading up on a platform where the theodolite is located.

Q. What are the functions of a theodolite?

A. We track the balloon up to its maximum height for the purpose of determining the direction and velocity of wind.

Q. Well, are there instruments located there that you use in connection with your work?

A. Yes, sir; on the platform.

(Deposition of Fay R. Livingston.)

Q. I would like to have you examine, please, a sketch that has been marked here as Plaintiff's Exhibit "A" for identification, and you will observe a legend here, "Theodolite room above the vault," indicating an area on the sketch? [47]

A. Yes, sir.

Q. Also a stairway—two stairways, we will say, at right angles, one with an arrow pointing to the west, and another with the arrow pointing to the north, do you recognize that as a sketch of the stairway leading from the floor of the theodolite room down into the hallway that you referred to?

A. Yes, sir.

Q. Would that be approximately the relative position of that stairway for sketch purposes—I mean on the second of June, 1949?

A. Yes, sir; for sketch purposes.

Q. So leaving this area that is indicated by the arrow, and marked "Theodolite room above vault," you would follow the direction of the arrow downstairs into the hallway; is that right, sir?

A. Yes, sir.

Q. And then after getting into the hallway to the north of the second arrow, where would your U. S. Department of Commerce, or Weather Bureau room, be?

A. It would be to the east.

Q. Would you write in there, Mr. Livingston, please, "Weather Bureau Room," just in that area, please?

A. Yes. (Witness marks on Exhibit "A.")

Q. You have now with pen and ink written a

(Deposition of Fay R. Livingston.)

legend, [48] "Weather Bureau Quarters," to the east of the hall stairway that we have referred to; is that right, sir? A. Yes, sir.

Q. Now, coming from the Weather Bureau quarters then, is it true that you would go through the west wall of those quarters into a hallway, on the second of June, 1949, in order to come up into the theodolite room above the vault?

A. Yes, sir.

Q. And then after getting to the floor of the theodolite room, to get to your theodolite instruments, where would you have to go—or where did you go, at least, on that second of June, 1949?

A. There is about eight or nine stairs from the top of the vault up to the platform.

Q. And I observe on this sketch an arrow leading from a legend, "Stairway to Platform," is that the stairway to which you refer? A. Yes.

Q. Is that right? A. Yes, sir.

Q. Now, then, Mr. Livingston, in order to reach this instrument that you have named "Theodolite instrument," would you as a part of your employment have to walk up these eight or nine stairs to that platform to use that instrument? [49]

A. That is true.

Q. And the instrument then would be directly above this platform, would it? A. Yes, sir.

Q. Now, what would there be then, or what was there on the second of June, 1949, above this platform, up here (indicating), above it?

A. The theodolite?

(Deposition of Fay R. Livingston.)

Q. Yes. A. Is that what you want.

Q. Dome, I am referring to.

A. I see. There is a dome on top of the roof; yes.

Q. And that dome, was it constructed then so you could put an opening in that dome so that you could leave out a balloon, or observe the weather, or something of the sort?

A. We don't release our balloons there. We release them from ground level.

Q. I see.

A. We use the dome as an observation point to observe the balloons.

Q. Then seated, or standing, on the platform that we have indicated above the floor of the theodolite room, as a part of your employment you can use this dome above the platform to observe these balloons; is that right? [50] A. Yes, sir.

Q. Now on the second of June, 1949, was there a plug, or electrical outlet, somewhere in the vicinity of that eight or nine stair stairway and the platform?

A. Yes, sir. As I recall it is directly at the top of the stairs.

Q. Then there appears here on this sketch "approximate position of 110-volt outlet," with an arrow leading to a cross, that cross being to the south of the platform. That outlet then would be in the south wall, would it?

(Deposition of Fay R. Livingston.)

A. That is correct.

Q. Above the stairway? A. Yes, sir.

Q. And approximately at the top of it?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. On the afternoon of the second of June, 1949, in going to your work at the theodolite instrument, did you encounter a wire, or an extension, that was stretched across the stairway there?

A. Not going to the theodolite, no, sir.

Q. When did you encounter it?

A. Coming down, after I had finished my balloon run. [51]

Q. You had then taken a balloon run as part of your employment, had you? A. Yes, sir.

Q. And had gone up to the platform in the theodolite room; is that right? A. Again, sir?

Q. You had gone up to the platform in the theodolite room as a part of your work, had you not?

A. Yes, sir.

Q. And then leaving that platform and coming back down, will you say whether or not you encountered an extension in some manner?

A. Yes, sir; I did.

Q. Did you trip on it, or something?

A. I didn't exactly—I don't recall if I tripped or not, but I do know that I pulled it out of its socket in some way.

Q. I see. And where did that extension lead, Mr. Livingston, on that afternoon?

(Deposition of Fay R. Livingston.)

A. It went into the attic.

Q. And from the approximate position of this 110-volt socket, did that extension lead through some opening in the theodolite room into the attic?

A. Yes, sir. [52]

Q. And what opening was it?

A. Well, there is a small opening there—they call it a cubby hole—I figure it is about—well, you have already given the measurements of it. It is the only one there.

Q. And that extension then led from that socket approximately along into the attic through that opening; is that right?

A. Yes, sir.

Q. Now, did you have occasion to examine this extension, or for any purpose determine anything about that extension, on the afternoon of the second of June, 1949?

A. I noticed it. I disconnected it from the socket and I was concerned I might have left somebody in the dark in the attic.

Q. And then what, if anything, did you do on that occasion?

A. Well, as I recall there is a box there you step on to get up into this cubby hole, and I stepped up on the box and leaned—these lights, as I recall, was in the extreme southern end of the attic, and to make certain there wasn't anyone working in there I attempted to step out on this ceiling joist and look back in there to see if there was anyone there, and I missed the ceiling joists and fell through the ceiling.

(Deposition of Fay R. Livingston.)

Q. Fell through the ceiling? [53]

A. Yes, sir.

Q. Now, before you had made the examination into the attic that you mention, did you connect up the extension into the socket again so you did have light, or not? A. No, sir.

Q. You did not? A. No, sir.

Q. What was the condition of this attic space with reference to whether or not there was any natural light in there on that afternoon, in the attic space?

A. There was no natural light other than what came through the cubby hole I was standing in.

Q. I see. Would you say then the entire attic space was dark as you looked in on that occasion?

A. I would say it was dark; yes, sir.

Q. And stepping in then to determine whether or not there were any workmen that had been using that light was when you fell through between the joists; is that right, sir? A. Yes, sir.

Q. And what is your present age?

A. I am thirty-one—thirty-two, excuse me.

Q. And on the second of June, 1949, you of course would be——

A. I would have been twenty-eight. [54]

Q. How long had you been employed by the Weather Bureau? A. At that time?

Q. Yes.

A. Well, approximately six years—a little over six years.

(Deposition of Fay R. Livingston.)

Q. You had been working for them then continuously, had you?

A. Yes, sir. Not at this location, however.

Q. But you had been employed by the United States Weather Bureau for a period of six years?

A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. And you are still following that employment at the present time? A. Yes, sir.

Q. When you fell through the space there, into what room did you fall?

A. Into the men's lavatory.

Q. Was there anyone in there on that occasion that you remember? A. Two men.

Q. And did you recognize one of them as being Joe [55] Hennessey—you didn't know Joe Hennessey at the time? A. No, sir; I didn't.

Q. But did you learn that was his name, one of the men, or not?

A. Yes; it was several years later, however.

Q. You didn't know at that time who the man was you fell against? A. No, sir.

Q. What did you weigh, approximately, on that occasion?

A. Well, my weight varies between one hundred fifteen—I have weighed one hundred and thirty when I was in the army, but that is the most I have ever weighed.

Q. So your weight would run between one hundred and fifteen and one hundred and thirty; is that right? A. Yes, sir.

(Deposition of Fay R. Livingston.)

Q. Had you had occasion to weigh some time before that?

A. No, sir; not to my knowledge.

Q. Mr. Livingston, how familiar were you with this attic space in the area above the men's wash room, and in the area directly to the east of the theodolite room?

A. I had very little knowledge of it.

Q. You were not acquainted with it, or had not had occasion to be in there before?

A. No, sir. We had occupied the building just two [56] weeks prior to the accident.

Q. So that then with regard to the theodolite room on the second of June, 1949, was that room lighted? Was there a light on there?

A. As I recall there is a light there. It would have been; yes.

Q. And it was lighted on that occasion?

A. Well, usually in the daytime there is sufficient light there to not require other light, artificial light.

Q. Oh, I see. At any rate, it was lighter in the theodolite room than it was in the attic space through that cubby hole; is that right?

A. Yes, sir.

Q. So you were going from a lighter room into a darker room; is that right?

A. That is correct.

Q. You did not, however, connect up the light extension, you didn't put that extension back into the socket and turn on the light, did you?

(Deposition of Fay R. Livingston.)

A. No, sir; I didn't.

Q. And there was an electric light on the end of that extension, was there not, on that occasion?

A. Well, I wouldn't swear to that, either. I know there was later on. [57]

Q. Later on in the afternoon, did you find a light on the end of that extension?

A. Well, I believe they turned the light back on when they were looking it over, Wally Wilson, when they were investigating the accident.

Q. And that would be approximately how long after the accident, would you say?

A. Well, I went down—I mean I went in and took my observation, my regular observation, and filed that, which is supposed to be filed around thirty minutes past the hour, and as soon as I had done that I notified Wally Wilson.

Q. That was the gentleman who preceded you on the stand here, the manager of the airport?

A. Yes, sir.

Q. And then immediately following that, in investigating the accident, Mr. Wilson turned on that light, did he?

A. As I recall, it was turned on some time during the process.

Q. Of the investigation; is that right?

A. Yes, sir.

Q. What, if any, injuries did you sustain? Were you hurt at all in this fall to the floor of the men's restroom?

(Deposition of Fay R. Livingston.)

A. Not to my knowledge, other than a bruised knee.

Q. Outside of a bruised knee you didn't sustain any [58] other cuts or abrasions on your body, did you? A. No, sir.

Q. Mr. Livingston, on the occasion of the second of June, 1949, when you went through this cubby hole into the attic, there was no artificial light in there at that time, was there?

A. I don't recall any. I could be wrong on that.

Q. But to the best of your recollection it was dark in there, and no light was coming through except what came through this cubby hole?

A. Yes, sir.

Q. You did not require any hospitalization of any kind so far as any injuries to yourself in that fall were concerned, did you? A. No, sir.

Q. And have suffered nothing except a skinned knee? A. That is right.

Q. What is your height, sir?

A. Well, offhand, I would say five feet four inches; that is approximate.

Q. During the afternoon, Mr. Livingston, of the —of June, 1949, did you know that there were workmen employed in remodeling that building?

A. I did not. [59]

Q. You had no personal knowledge of it?

A. No, sir.

Q. I will ask you if you will please mark an arrow showing the direction from the floor to the platform in this stairway, something similar to the

(Deposition of Fay R. Livingston.)

arrows that are pointing there (indicating). I want the arrow to point from the floor to the platform showing the direction, in the stairway itself.

A. Like this, sir (indicating) ?

Q. Yes. You are going up, though.

A. Oh, you want it going up ?

Q. Yes.

(Witness marks on Exhibit "A.")

Q. So that the arrow that you have now marked with pen and ink shows an arrow leading from the floor of the theodolite room to the platform which we have referred to; is that right, sir?

A. That is correct.

Q. Will you put your initials right at the tail of that? Write your initials, please?

(Witness marks on Exhibit "A.")

Q. You have now written your initials, "F.R.L.," is that right? A. That is correct.

Q. And would the position, the approximate position, of [60] the cubby hole with relation to this electrical outlet be as is indicated here on this sketch? A. Yes, sir; approximately.

Q. Approximately in that position; is that right? A. Yes, sir.

Mr. Doepker: You may inquire.

(Deposition of Fay R. Livingston.)

Cross-Examination

By Mr. Angland:

Q. Mr. Livingston, do you recall whether or not you did strike Mr. Hennessey when you fell through the ceiling?

A. I am not certain that I did; no, sir.

Q. You do recall you fell to the floor?

A. Again, please?

Q. You recall falling to the floor?

A. Yes, sir.

Q. What did you observe when you gathered yourself together a little bit, when you were on the floor there?

A. Well, I noticed the gentleman closest to me was brushing insulation off of him. There was considerable insulation fell down with me when I came through.

Q. That is insulation material that was up in the attic?

A. Yes, sir.

Q. Is that the gentleman who has been identified as [61] Mr. Hennessey?

A. I believe that is correct; yes, sir.

Q. You saw Mr. Wright here testifying today?

A. Yes, sir.

Q. Was Mr. Wright brushing himself off, or was it the other man?

A. It was the other man.

Q. Did that occur while you were still on the floor, that you noticed him brushing insulation off of his shoulder, or not?

(Deposition of Fay R. Livingston.)

A. I wouldn't say definitely.

Q. You don't know whether you were still on the floor, or whether you had stood up then?

A. No, sir.

Q. Was there any conversation between you and Mr. Hennessey and Mr. Wright?

A. I asked the gentleman brushing himself off if I had hurt him in any way.

Q. Did he reply to you?

A. He said no, that he was glad I didn't weigh a hundred and seventy-five or two hundred pounds, in a laughing manner.

Q. In a laughing manner? Did both men laugh about the matter, or what was the situation about that? [62]

A. Yes, sir; both men seemed to think it was a humorous situation.

Q. Were you pretty well shaken up, or not?

A. Well, I suppose the first few seconds it was quite a shock, but after that I had no adverse feelings from the fall.

Q. No, Mr. Livingston, just tell us why you went into the attic.

A. Well, I never went—I would say I didn't go into the attic; I didn't have any intention of going into the attic; I was just leaning into the attic to see if there were any workmen working there or not. I was quite certain there weren't because I hadn't heard anyone go up the stairs, but it was quite possible someone had gone up there while I

(Deposition of Fay R. Livingston.)

was out reading my temperatures, which are quite a distance from the building.

Q. You had no intention of going into the attic?

A. No, sir; the only purpose I had in mind was to make certain that I hadn't left someone in the dark.

Q. You weren't going in there then on any business for the Government? A. No, sir.

Q. Or that had anything to do with your work in the Weather Bureau? [63] A. No, sir.

Q. Did the Weather Bureau have any equipment at all in this attic?

A. No, sir; no equipment. They had considerable wiring.

Q. Did they have any equipment in there on the second of June, 1949? A. No, sir.

Q. Did they have any wiring in there then?

A. Yes, sir; they had—well, I wouldn't recall the amount of wiring, but we were taking observations of our wind instrument, so there must have been wiring in there.

Q. It was connected? A. Yes, sir.

Q. It was connected to your office in some manner?

A. Yes, sir. But I had no business to be in there in the performance of my duties.

Q. Mr. Livingston, if we issue a subpoena for you to be in Billings, Montana, for the 15th of January, you will be available and will be there to testify, will you? A. Yes, sir.

Mr. Angland: That is all. [64]

Mr. Doepker: That is all, Mr. Livingston.

(Witness excused.)

Mr. Doepker: I guess that is all, Mr. Angland.

Signed:.....

Subscribed and Sworn to before me this the 8th
day of January, A.D. 1953.

ED. M. BRYAN,
Clerk, U. S. District Court,
District of Idaho.

By,
RAY D. BISTLINE,
Deputy Clerk.

ROBERT SCOTT STOKOE

called as a witness on behalf of the plaintiff, being
first duly sworn, testified as follows:

Direct Examination

By Mr. Doepker:

Q. Will you please tell the Court your name?

A. Robert Scott Stokoe.

Q. What, if any, profession or calling do you
follow? A. I am a physician and surgeon.

Q. Are you duly licensed to practice your pro-
fession in Billings, Montana? A. I am.

(Testimony of Robert Scott Stokoe.)

Mr. Angland: We will admit that the doctor is a regularly [92*] licensed practicing physician and surgeon.

The Court: Very well.

Mr. Angland: And that he is a qualified physician and surgeon.

The Court: Very well.

Mr. Doecker: Thank you for the admission. I may desire to go a little bit into his training, however, your Honor, in addition to that.

The Court: Very well, proceed.

Q. Doctor, what school of medicine did you graduate from?

A. Marquette University in Milwaukee.

Q. And taking your courses there at Marquette University, did you have occasion to study as a part of your professional training the blood vessels and the treatment of diseases or injuries that are sustained to blood vessels, did you study that as part of your training?

A. That is a normal part of the curriculum, yes.

Q. In your subsequent years after you graduated from Marquette University, what further experience did you have in your profession?

A. Well, I had my internship in Oak Park Hospital just outside of Chicago.

Q. Is that a hospital, Doctor, is that a large hospital with many departments in it?

*Page numbering appearing on page of original Reporter's Transcript of Record.

(Testimony of Robert Scott Stokoe.)

A. It is not large, it was approximately a 150-bed hospital. [93]

Q. A 150-bed hospital, and you served your internship there, did you? A. I did.

Q. Did you practice in Illinois and Wisconsin?

A. I did not practice in Illinois, with the exception of my internship. In Wisconsin I did subsequently practice in a Veterans' Administration Hospital.

Q. Was that a hospital of some extent, the Veterans' Administration?

A. We had a Veterans' Administration Hospital in Milwaukee, we had a 1400-bed hospital, and then we had another 1500, we call them semi-patients, in a domiciliary unit. I spent one year in surgical residency at that hospital, and I spent six months on the staff with the domiciliary unit.

Q. I see, so you did have considerable experience in treatment of diseases, diagnosis, did you not? A. At that time I did.

Q. Did you then subsequently serve as a physician in the military or navy?

A. Between my internship, or, I should say, after my internship, I served one year in the Navy.

Q. The United States Navy? A. Yes.

Q. Then, did you have any other experience besides what you have related now before coming to Billings? [94]

A. I spent nine months at the University of Minnesota when I came out of the Navy in a continuation course in the basic sciences. It was partly

(Testimony of Robert Scott Stokoe.)

clinical, mainly the basic elements of medicine, you might say.

Q. When did you graduate from Marquette, Doctor? A. 1944.

Q. I believe you have already stated you have been practicing your profession in Billings, Montana, have you? A. I have.

Q. When did you first come to Billings?

A. I believe it was June of 1949, May or June of 1949.

Q. In the summer then of 1949, and you became associated with some clinic, did you not?

A. With the Soltero group.

Q. Is the Soltero group general practitioners?

A. They are.

Q. Would you say whether or not you are a clinic that has many patients, or not?

A. We have.

Q. During the year 1949, did you become acquainted with the plaintiff, Joseph P. Hennessey?

A. I did.

Q. And did you have occasions during the year 1949 to treat him in your professional capacity?

A. I did. [95]

Q. Do you recall now, Doctor, the first occasion of your having an occasion to treat Mr. Hennessey, approximately, I mean?

A. The first time that I treated Mr. Hennessey, to my recollection, was when I hospitalized him in St. Vincent's Hospital.

Mr. Doepker: May the record show we are ex-

(Testimony of Robert Scott Stokoe.)

amining Defendant's Exhibit 1, which consists of more than one part, one part consisting of nine sheets, one part consisting of 19 sheets—

The Court: Well, it is going to be confusing. Maybe you had better mark them separately, 1-a, 1-b and 1-c.

Mr. Angland: It is all one exhibit so far as the defendant is concerned. I have a purpose in stating that to the Court.

The Court: But mark it 1-a, b, and c, to keep it straight.

Mr. Angland: Yes, that is perfectly all right.

Q. Doctor, I presume that at the time you hospitalized him at St. Vincent's Hospital in the year 1949, that as a part of your hospitalization, you had physical examinations of him made, did you?

A. I made them, yes.

Q. And made them yourself, and did you also at that time have what is known as a graphic chart, showing the temperature and pulse and respiration, treatment record, and also a nurse's record that was made there? [96]

A. Yes, sir.

Q. And were those under your supervision as the attending physician?

A. Yes.

Q. Did the hospital and yourself keep these records in their usual course of the business of the hospital?

A. Yes.

Q. And were the records used by you for the purpose of treating the patient at that time?

A. Yes.

Q. To your knowledge were they correctly kept,

(Testimony of Robert Scott Stokoe.)

the records correctly kept? A. Yes.

Q. Can you, by referring to the records, Doctor, give an account of the condition that you found of Joseph Hennessey at that time, and the treatment that was made of him and the things that relate to his physical condition in that treatment?

Mr. Angland: I might say to the Court, if Dr. Stokoe hasn't had an opportunity to examine these records recently, we might save the time of everyone if the Doctor will take time and examine all the hospital records.

The Court: Well, it is about time to recess for the morning in any event. Court will stand in recess until 1:30 this afternoon.

(Noon recess.)

R. S. STOKOE

recalled as a witness on behalf of the plaintiff, having previously been sworn, testified as follows:

Direct Examination

By Mr. Doepker:

Q. Doctor, I believe that at the time we adjourned for the noon recess that we were inquiring of you concerning your acquaintanceship as a patient with the plaintiff in this case, Joseph P. Hennessey, and we were starting to direct your attention to the hospitalization which you had made of him at St. Vincent's Hospital in Billings, Montana. Do you recall that? A. I do.

(Testimony of Robert Scott Stokoe.)

Q. We were submitting to you a chart, a portion of Defendant's Exhibit 1 for identification, which the Clerk has marked as the portion 1-a of Defendant's Exhibit 1. The Court permitted you to review this chart that you have testified now was made [106] up largely under your direction, and also by yourself, and the graphic chart which relates temperature, pulse and respiration of the patient, treatment record, and also the nurses' record. Having had an opportunity to review this chart, Doctor, can you testify now what you treated him for then, at the occasion on the 29th of November, 1949?

A. May I read my diagnosis from the chart?

Q. Yes.

A. My diagnosis was acute laryngitis.

Q. And the acute laryngitis was sufficient for you to believe that he required hospitalization, was it, at that time?

A. That is correct.

Q. And at that time did you make a complete physical examination of the plaintiff, Joseph P. Hennessey?

A. I did.

Q. Are you in a position, aside from the record there, to remember all the details of it, or are you in a better position to testify from all the details of it by referring to the record?

A. I am in a better position to refer occasionally to the record at least.

Q. All right. Will you tell the Court what it was that you discovered in connection with that physical examination on that occasion?

(Testimony of Robert Scott Stokoe.)

A. He entered the hospital with the complaint of hoarseness of [107] 30 hours duration.

The Court: What is the date of this one now, pardon me?

A. November 29th, 1949.

The Court: Very well, proceed.

A. He also complained of the left side of the chest pains, and he also complained of pain in his upper abdomen of several months duration, which was worse on inspiration and on bending forward. This had become markedly aggravated the last few weeks before admission. At that time, his past history, as recorded on this chart—there is more than this on other charts—his past history included nephritis as a child, with no residuals to the patient's knowledge.

Mr. Angland: What was that word, to his knowledge?

A. No residuals—I had sequelae on the chart. He admitted having partaken quite heavily of alcohol recently before admission. The examination at that time revealed his head to be essentially negative except for some swelling in his throat. There were occasional bronchial, or abnormal breath, sounds heard in both lung fields at that time. His blood pressure showed some elevation, not marked. His heart was normal, although the rate was rapid as it normally would be with infection. His liver at that time was tender and it could be felt, it could be palpated at that time.

Mr. Angland: What was that last?

(Testimony of Robert Scott Stokoe.)

A. Liver could be palpated, yes, and it was tender; then the [108] striae were noted on his abdomen.

Q. Now, for a layman record, are you referring to some breaking of the skin of the abdomen that you observed at that time, is that what you refer to as striae?

A. Yes, because of his previous nephritis.

Q. All right.

A. Because we thought his liver might be involved, the laboratory test that we did included a very sensitive liver test. This test was negative, so at least his liver was considered functioning normally, even though tender and slightly enlarged on admission. His urine at that time was normal with the exception of a trace of albumin and a trace of acetone. His red count was mildly above normal, his red blood count, I should say, was mildly above normal. Another liver function test was also run which was within normal limits. X-rays of his lungs revealed increased markings in one area of his lung field, which the radiologist felt was compatible with sinusitis or a post-nasal drip, and these markings were not taken with any serious note. His course in the hospital was a slow but apparently complete recovery. He was discharged December 4th.

Q. With respect to the nurses' record in these charts, Doctor, will you explain to the Court the function of the nurses' record which appears in the St. Vincent's Hospital Exhibit to be on a blue form? [109]

(Testimony of Robert Scott Stokoe.)

A. The function of the nurses' record is primarily to help the doctor, possibly in his diagnosis, and in his treatment.

Q. And in the case of Mr. Hennessey, on the occasion we are now considering of November 29th and subsequently until discharged, will you examine that record and see whether you find anything in there to indicate something that would cause you as a physician to feel that it would affect his past or present condition in any way?

Mr. Angland: Read that question.

(Question read by reporter.)

Mr. Doepker: I am referring to the nurses' record.

Mr. Angland: Go ahead.

A. The routine observations were made by the nurses, including a mention of his hoarseness, shaky hands, sore throat, and a gradual improvement. I see nothing else.

Q. Among the complaints that he made at the time that you admitted him, you referred to him complaining of abdominal pains of several months' duration, is that right, is that correct, Doctor?

A. That is correct.

Q. Then at the time of his discharge from the hospital, Doctor, what have you to say with reference to his condition as to cure, or whether he was still suffering some illness or disability at that time?

Mr. Angland: Just a minute, Mr. Doepker. Is

(Testimony of Robert Scott Stokoe.)

this as to [110] the treatment he received then, or as to his complete physical condition now?

Mr. Doepker: I am referring to the complete physical condition at the time of his discharge in November, whatever this date is again?

Mr. Angland: December 4th.

Mr. Doepker: He was discharged on December 4th?

Mr. Angland: I believe that is what the doctor said.

Mr. Doepker: About his general condition at that time. What is your recollection, or what does the record show his condition to be at that time?

A. His condition would be improved. I could not say that he was completely cured as I rarely leave a person in the hospital until they are completely cured. He was definitely on his way to recovery, generally speaking, when he left the hospital.

Q. Now, then, on that occasion, may I inquire, Doctor, if you found anything in the nature of disease or trauma connected with his heart?

A. Nothing.

Q. Or did you find anything the nature of disease connected with his lungs to the extent that it would be causing an infection or an abscess or something of that nature?

A. No, as I previously mentioned, there were some increased lung markings on the X-ray, but they were not taken to be of clinical significance. [111]

Q. The examination that you made at that time,

(Testimony of Robert Scott Stokoe.)

was there anything indicative in that examination as to nephritis or him suffering at that time from nephritis?

A. He was not at the time suffering from nephritis, from active nephritis. He did show a trace of albumin, which could be the residuals of nephritis, and not be of clinical significance, or it could be caused by the partaking of alcohol.

Q. The condition, then, of Mr. Hennessey, on the 4th of December, is now as you have described it, as near as you could tell from your treatment and observation of him, is that right, on the 4th of December, 1949? A. Yes.

Q. Then, when did you next have occasion to have Mr. Hennessey as your patient?

A. The next recollection that I have of seeing Mr. Hennessey was the day that he was admitted to Deaconess Hospital.

Q. Are you now referring, Doctor, to the 3rd day of January, 1950? A. I am.

Q. And on the 3rd day of January, 1950, did you have occasion to have Joseph Hennessey again as your patient? A. I did.

Q. And in connection with that treatment, you stated that you had him in the Deaconess Hospital, is that right? [112] A. That's right.

Q. I am now referring to Defendant's Exhibit 2 for identification, and I want to inquire about the first part, or the condition of Mr. Hennessey from the date of the admission on the 3rd of January through for a period of three days subsequent to

(Testimony of Robert Scott Stokoe.)

that to start with. From your independent recollection, Doctor, can you relate that condition, or would you be in a better position to give the Court the facts by referring to the hospital chart that was kept of his case at that time?

A. I am sure I could be more accurate from the chart as to his history.

Q. In connection with your treatment of this patient or of any patient, what do you say as to the necessity for a doctor to have a history in order to make an intelligent diagnosis?

A. It is most important in some cases.

Q. And in this particular case, would you say it was important? A. Yes.

Q. Now, with regard to the chart that you have referred to here as the Deaconess Hospital chart, and which we have referred to as Defendant's Exhibit 2 for identification, were you the physician in charge of Joseph P. Hennessey during the entire time that he spent in the hospital on that occasion? A. I was. [113]

Q. And did you yourself have supervision of the records that were made at the Deaconess Hospital at that time? A. Yes.

Q. Did you yourself also keep records at that time? A. I did.

Q. Do those records contain the same outline, I mean the same things that are in the hospital records, and that appeared in the previous exhibit that we were referring to with respect to the doctor's

(Testimony of Robert Scott Stokoe.)

records and the nurses' records and X-rays and laboratory tests and so on?

A. Possibly I didn't understand you. I didn't keep records separately. The only records to do with the hospitalization are all found in the chart.

Q. So that so far as the first few days are concerned, they were just a part of this entire record, is that what you refer to? A. Yes.

Q. As far as you know, Doctor, were they kept in the usual course of the business of the hospital, entries made in the usual course of the business of the hospital? A. They were.

Q. And were they correctly made?

A. I am quite—within reason they were correctly made, yes.

Q. And as far as that you yourself have entered in here, they represent your record of this case, do they? [114] A. That is correct.

Q. May I ask you to refer to Defendant's Exhibit 2 and relate to the Court, if you can segregate it there, the first part, or the part of the case you were concerned with from the 3rd of January and for the first three days?

A. As I have stated on the history, some one month previous to this admission, he had severe laryngitis. His cough persisted up to three days before admission, before this admission. When the cough became severe, he developed a temperature and a general malaise or ill feeling. He was hospitalized because of this increase in his cough and his temperature.

(Testimony of Robert Scott Stokoe.)

Q. Well, now, Doctor, at this time what have you to say as to what you considered him to be suffering from as far as the first three days, that would be the 3rd, 4th and 5th, at least, of that hospitalization?

A. I believed that he had bronchial pneumonia.

Q. May I inquire if you have a recollection of this case, independent recollection, I mean, of the case of Mr. Hennessey on this occasion?

A. Yes.

Q. I am referring now to your diagnosis of bronchopneumonia. Would you say it was severe or mild or border line in your estimation as a physician?

A. It was a border line case. The chest X-rays taken at that time was read by the radiologist as a normal adult chest. [115]

Q. The chest X-rays would disclose what organs particularly?

A. The lungs, heart and the chest wall.

Q. Then as far as the examination up to the 6th of January, 1950, you found no condition other than the bronchopneumonia, is that right, or will you state, Doctor?

A. I found also an infected and edematous or swollen throat. He had, along with this border line pneumonia, an upper respiratory infection that had not completely cured from before. According to my chart, apparently, his abdomen had cleared. There was also the blood pressure, I again noted a mild elevation. He showed a faint trace of albumin—I

(Testimony of Robert Scott Stokoe.)

beg your pardon—there was no urinalysis before January 9th, 1950.

Q. All right. Then from your treatment, examination and consideration of the condition of this patient in the first part of January, 1950, did you find any pathology connected with his heart, liver, or his lungs? A. Only as stated.

Q. And that was a border line bronchopneumonia?

A. With an upper respiratory infection, yes.

Q. And that upper respiratory would be the larynx and trachea?

A. Throat, larynx and trachea, yes.

Q. Did you find upon that occasion any heart murmur? A. I found no murmur.

Q. Did you find any indication upon his admission to the hospital at that time of any abscess upon the lungs? [116] A. No.

Q. And on that occasion did you find any other condition in the heart that caused you to feel that the heart was damaged or that the heart was afflicted in any manner by disease? A. No.

Q. What was the progress then of that case from the 3rd of January, 1950, to the 6th of January, 1950? A. His progress was satisfactory.

Q. Go ahead, Doctor.

A. His temperature improved and his general feeling of well being improved, and I don't have it in the chart—the day before planned discharge, we had discontinued all of his medication with the exception of his cough syrup, which we had changed

(Testimony of Robert Scott Stokoe.)

to have him ask for that if he needed it, and he was up and about the day before discharge.

Q. All right. That planned day of discharge was what day, then, Doctor?

A. The planned day of discharge was January 7th.

Q. 1950?

A. Yes. I had told him on the 6th if everything was still all right on the next morning that he could go home.

Q. Now, then, did something develop subsequent in this case after the 6th day of January, 1950, Doctor? A. Yes. [117]

Q. Will you tell us what it was in chronology, what from the physician's standpoint.

A. May I read portions of this from the chart for accuracy?

Q. That is your most accurate record, is it not?

A. Yes.

Q. Those are the facts as near as you can derive them?

A. That is correct, that is the reason I would like to read them.

Mr. Angland: As a matter of fact, Doctor, you couldn't testify accurately without the use of the chart as to all matters——

A. I could not testify as accurately.

Mr. Angland: That is what we want to know.

A. This is written at the time and is my impression as it was at that time. Quoting from the progress record on January 7th, 1950—well, before

(Testimony of Robert Scott Stokoe.)

that, I would like to state from memory that I do remember that I was home that morning at roughly nine o'clock, possibly slightly before. I got a call from the nurse and she told me that Mr. Hennessey had been in the bathroom, I believe, and had collapsed with severe pain in his lower extremities, and I ordered a sedative given and immediately went to the hospital, and I wrote in the chart that morning, "Patient awakened with numbness of both feet. This progressed up both legs to his knees, and he developed severe pain around the third lumbar vertebra—" That is one of the lower lumbar vertebra. The pain was excruciating, and when [118] seen by me he had a partial whitish cyanosis of both feet with coldness and bilateral absent lower leg reflexes, severe tenderness about his third lumbar spinous process. He had responded well to a quarter grain of morphine with atropine. Emergency X-rays were taken of his back, which I had thought revealed two fractured, two old fractured transverse processes on the left, which incidentally the radiologist did not feel existed. There was an area on his right foot—I beg your pardon. His foot within one and one-half hours became normal—if I may add memory, I believe there was some residual pain in his right heel, even though I put down here that the foot was essentially normal. His reflexes then began returning in his left foot, though the above-mentioned discoloration persisted. Because of finding an elevated pressure on entrance with this case the night before entrance, or the

(Testimony of Robert Scott Stokoe.)

night before intended discharge, I had taken his pressure, and it had come down. The systolic, the upper reading, was normal at 124; the diastolic reading was still mildly elevated. That morning due to the excruciating pain, I believe, his pressure became markedly elevated. I noted at the time his heart was still negative, and I believed it to be at that time a vasospastic phenomenon, and he was treated symptomatically for a few hours. Then he remained in bed, and he improved to about 3:30 in the afternoon when he had an acute recurrence of his pain behind his left knee, extending on down to his great toe. It was [119] realized at that time that the reason for the marked vessel spasm was because of a saddle embolus or condition, a clot, in the aorta, temporarily lodged where aorta splits to go down either leg. Evidently the larger portion of the clot slipped off and went down to behind his left knee in the artery. He was then put immediately on medical treatment for an arterial embolus, including drugs and sympathetic nerve injection.

Q. Now, Doctor, at this point, may I inquire, will you relate to the Court the evidences which you had available to substantiate your diagnosis of the block or blood clot in the aorta? Will you relate what those specific symptoms were, please?

A. There was—when first seen—a total loss of color, or nearly a total loss of color in both feet and up nearly to both knees. There was obviously no blood coming into the legs, or if there was any, it was a very minimal amount. Then with the marked

(Testimony of Robert Scott Stokoe.)

temperature change, his legs were extremely cold. That was the most important—those are the most important, significant features.

The Court: That is the condition that existed when you first saw him?

A. Yes, sir.

The Court: You didn't at that point think, however, that it was a clot in the aorta? [120]

A. Because he responded so well to morphine, we didn't originally, but then subsequently by what happened, it had to be a saddle embolus which had slipped off and gone on down into the leg further.

The Court: Then, it would be what happened that indicated to you there was an embolism, not the original condition as you say?

A. Well, both together, yes.

The Court: Very well.

Q. All right. Then, Doctor, in addition to the absence—the whiteness and coldness of the leg, what else was there at that time that indicated to you that this was an aorta damage? Was there anything else that you could point to and say this clot is in the aorta, or not?

A. The pain in the back would go along with the saddle embolus, yes.

Q. And the pain in the back was located at what point?

A. In the area of the third lumbar vertebra, or lower back.

Q. I see. Did you, during the course of this original diagnosis find anything direct or palpable, feel-

(Testimony of Robert Scott Stokoe.)

able evidence of the exact location of this embolus at this time, sir? A. At which time?

Q. The first part, the 7th or 8th or 9th. At that time was there something you could feel in a blood vessel, I mean actually put your finger on it and feel? [121] A. No.

Q. Your deductions are from the symptoms that you have related, is that true, Doctor?

A. That's right, an embolus in the space behind the knee is in an artery that is in very deep and it is extremely difficult to feel that artery on some people, even when everything is normal. You just barely can get a pulsation behind the knee.

Q. Did you then treat that condition, or did you start immediately to treat that condition on the 7th of January, 1950? A. We did.

Q. What is it you did to treat it?

A. We injected the sympathetic nerves to the left side, to the left leg, by injections in the back just alongside the lumbar spine. We gave him blood anti-coagulants, that is, drugs to prevent further blood clot formation, and, questionably, to help dissolve a clot, and at that point of division, we gave him heavy sedation to attempt to break the spasm in the blood vessels distal to the point where the clot forms so that the other blood vessels extending from in the thigh to down in the calf could take over and supply the rest of the leg with blood.

Q. All right. Now, you used something in the spine. That is, [122] was that some drug?

A. Just outside the spine, yes, sir, we used novo-

(Testimony of Robert Scott Stokoe.)

caine. Incidentally, before that we had attempted something a little less complicated, even before the clot formed or went down into the left leg. We had used some injections of novocaine or procaine, an anesthetic agent, and that had not worked out well intervenously. Mr. Hennessey did not tolerate it. That was the same substance put into his back, not into the spine, but alongside the spinal column.

Q. You also used at that time, as you have stated, some anti-coagulants, is that right?

A. Yes.

Q. What were they?

A. Heparin and dicumarol.

Q. Will you relate at this point what quantity of that was administered by you to fight coagulation of the blood?

A. He was given the recommended initial dose of 400 milligrams of heparin and 200 milligrams of dicumarol initially. He was also given other drugs to attempt to break the spasm in the vessels.

Q. Will you relate those?

A. Papaverine and morphine. He was also given penicillin immediately prophylactically to prevent infection. He was also given a barbiturate for rest along with his morphine—I beg your pardon, he was not given the barbiturate until the [123] next morning when we were going to again inject his back.

Q. Then you immediately started in to attack the condition of clotting of the blood, did you not?

A. That is correct.

Q. And used everything to your knowledge

(Testimony of Robert Scott Stokoe.)

known to medical science to contest that condition, is that right, Doctor? A. That is correct.

Q. Now, will you search your record and see whether you have any record to describe the appearance of the leg, that is the change, or progress, in the appearance of the leg?

A. Yes, I wrote on the progress notation on January 8th, the next day, that the area of gangrene was apparently decreasing with the anti-coagulant therapy and lumbar paravertebral block. He was reblocked again that morning with apparent slight improvement. I noted that his left great toe and heel still appeared to be the most severely affected portions.

Q. All right. Doctor, when you refer to gangrene, will you translate that into a layman's understanding, from that standpoint, so that the Court may have an idea what you refer to there as gangrene?

Mr. Angland: Just a minute, Doctor. Your Honor, there hasn't been any connecting link, as I view the doctor's testimony thus far, between the accident or events down at Pocatello on June 2nd, 1949, and this hospitalization. He is showing a very aggravated condition here that the plaintiff [124] suffered from, and, of course, we would admit, we would admit from an examination of the hospital chart that there isn't any doubt but what the plaintiff was hospitalized and had a very severe condition, but I don't see the value of the doctor's testimony. He has now identified the symptoms——

(Testimony of Robert Scott Stokoe.)

The Court: I rather anticipate he is going to connect it up with an opinion later in his testimony.

Mr. Doepker: I am going to try to, your Honor. In the course of our examination, we expect to connect it up.

Mr. Angland: He has now identified the existence of a blood clot in the aorta.

The Court: Yes.

Mr. Angland: What I am getting at, what does that have to do with this accident. He must first establish that and then, of course, the course of treatment thereafter becomes material.

The Court: If it is connected.

Mr. Angland: I don't think it is material unless there is a connecting link there.

The Court: He has to connect it up, but I am not going to tell Mr. Doepker how to try his case——

Mr. Doepker: I think we have to have symptoms to work with in order to have an intelligent diagnosis.

The Court: That is your problem. We can take a little rest now. Court will stand in recess. [125]

(10-minute recess.)

Mr. Doepker: May he answer, your Honor?

The Court: Yes.

A. By definition, gangrene is death of tissue en masse.

Q. All right. Then going from the 7th on to the

(Testimony of Robert Scott Stokoe.)

subsequent days, what have you to relate to the Court in connection with the symptoms and progress of this condition that you have thus far described?

A. He had a gradual improvement with the areas of gangrene, the superficial skin dying off and new skin was formed underneath, and then because of the lack of blood to the muscles of the calf of the leg, there was destruction of tissue, destruction of muscle, destruction of nerve tissue, and only part of that could recuperate, could come back, so he was left with some permanent residuals.

Q. And what were those permanent residuals, Doctor?

A. In his leg, in his ankle, and his foot, that is, his calf, his ankle and his foot.

Q. Do you refer to the drop foot that he has at the present time? A. Yes.

Q. And the things that you have now testified to have not returned completely, is that right?

A. That is correct.

Q. Then, with respect to the dicumarol and the other drug, I [126] forget the name of it.

A. Heparin.

Q. Heparin, how long did you continue to administer that, according to the hospital record?

A. The last dose was given February 4th or 5th, February 4th.

Q. February 4th, 1950, is that right?

A. That is correct.

Q. Now, Doctor, with respect to the chart that

(Testimony of Robert Scott Stokoe.)

you are examining, are there any subsequent indications there of anything that, to your mind as a doctor, would affect his condition that you have related. By that I mean was there anything else that developed during the course of this hospitalization?

A. There were no other conditions developed, no.

Q. And the rest of the record, Doctor, that comprises the Defendant's Exhibit Number 2, besides the things you have alluded to, that is, the X-ray findings and the laboratory findings and the other records that appear in this chart relating to the nurses' history, is it, and the things that transpired during the time that he was under their treatment?

A. That is correct.

Q. And the nurses' chart also shows the food and the treatments that were administered under your direction, is that right?

A. That's right.

Q. Also what is known as the Buerger's exercises, is that [127] right? A. Yes, sir.

Q. Subsequently, before he left the hospital, was there an X-ray examination made for the purpose of determining whether there was any pathology in the heart, the aorta and lungs, bases, and the diaphragm—was there an X-ray examination made under your direction for the purpose of examining that condition at that time? A. Yes, sir.

Q. And at that time did they also X-ray the right and left ankles laterally and A-P, as the doctors call it, or front and back?

(Testimony of Robert Scott Stokoe.)

A. Front and back, that is correct.

Q. Then what have you to say as to what was disclosed in those examinations and so forth, if you found anything wrong with any of those organs?

A. All X-rays taken were negative.

Q. And that last X-ray then was taken on what date? A. February 19th.

Q. February 19th. Will you explain to the Court, Doctor, the known sources of blood clots that are known to your knowledge at this time, from your reading or experience, to the medical science?

A. They must arise within the vascular tree. They can arise, rarely, from a vein anywhere in the body, and if they [128] are small, and if the patient has a defect between the right and left side, between the right and left auricle. It is conceivably possible, but doubtful—I don't remember ever reading of any case that a clot could get through the auricle, that is, from the right to the left auricle and then get out into the arterial circulation, shunting the lungs. That is the first source. The second source of embolus would be from the blood vessels of the lungs themselves, that is, the pulmonary vein or contributor to the pulmonary vein. The next source of embolus would be from the valves of the heart, that is, the left side of the heart, or from the wall of the heart muscle. The next source of embolus would be the wall of the aorta. It has to arise, that is an embolus must arise from within the lining of the blood vessel.

Q. And so the Court may understand that con-

(Testimony of Robert Scott Stokoe.)

dition, how does it arise in the walls of the blood vessel? A. How may it arise?

Q. Yes.

A. It can arise from infection in the wall of the blood vessel or from something eroding through into the inside of the blood vessel, an infection.

Q. What was that?

A. An infection eroding into the inside of the blood vessel, or it can arise from injury to the lining of the blood vessel, or it can arise from changes within the blood vessel wall itself [129] which will be found with age or other circumstances.

Q. Now, in your acquaintanceship with the history of this case, did you find any evidence of infection that would cause you to feel that this embolus arose from an infection, or to suspicion it even?

A. We did not at the time feel that way.

Q. All right, now, then did you find any of those conditions with the heart that you have related, that is, anything in the heart?

A. No, we didn't; we took electrocardiographs and we repeatedly listened to the heart and watched the pulse and we found no heart disease.

Q. Did you find any condition in the lung area that would lead to the condition you have diagnosed in this case? A. No.

Q. What would be the effect upon a blood clot, or what do doctors call it. What is the doctor's name for a blood clot that adheres to the wall of a blood vessel? A. Thrombus.

(Testimony of Robert Scott Stokoe.)

Q. What would be the effect upon, to assume a thrombus had formed in the wall of a blood vessel, of a resting for a period of three days, such as Mr. Hennessey had experienced in the hospital there, from the 3rd to the 6th or 7th of January?

Mr. Angland: Just a minute. Your Honor, there isn't anything in this case to show Mr. Hennessey experienced a [130] thrombus for three days. I'll object to that as not being based upon evidence presented in this case.

Mr. Doepker: We got a thrombus. Let's see where it came from.

The Court: He is just asking the doctor's opinion if a thrombus existed, what would be the effect of rest for three days, is that right?

Mr. Doepker: That's right.

The Court: I will overrule the objection. He is not saying the thrombus existed, as I understand his line of testimony. He is questioning the doctor with reference to the general medical science; he is questioning the doctor with reference to the general medical science on what you call blood clots or thrombosis, or emboli, how they arise, and what happens with them under particular circumstances.

Mr. Doepker: Your Honor should know those things if you are going to intelligently follow this case.

Mr. Angland: The objection was based upon the proposition that counsel presupposed Mr. Hennessey suffered from that condition.

The Court: Assuming—I think probably the

(Testimony of Robert Scott Stokoe.)

question did presuppose that, but it won't make any difference to me because there is no proof——

Mr. Angland: I wanted to object to it for the record.

The Court: In other words, you can ask him hypothetically, but [131] not as to—you can't assume at this point that a thrombus existed in Mr. Hennessey's case.

Mr. Doepker: No, we can't.

The Court: Very well, proceed.

(Question read by reporter.)

A. Were there a thrombus attached to the wall of a blood vessel while a patient was resting in bed, it can either stay there as it was before, or under circumstances of bed rest with changes in the blood vessel accompanying bed rest, and the changes in pressure, the thrombus could break off and go on down the vessel as an embolism.

Q. Now, Doctor, as I recall the history, or what you have related, the first symptoms that appeared in this case appeared when Mr. Hennessey had arisen in the morning on the 7th, had gotten up preparatory to leaving the hospital, is that your recollection of it?

A. Either after getting up or just before getting up, I don't know which.

Q. And then I want to ask you further if there was any indication of any thrombus coming from the walls of the heart, that is, by reason of warty

(Testimony of Robert Scott Stokoe.)

growths or anything of that nature in your examination of this patient? A. There was not.

Q. Do thrombi, in medical experience, form immediately, or do they require some growth to form, I mean by that, some growth [132] of the thrombus itself?

A. A thrombus takes some time to form, yes, sir. A thrombus due to infection—I can't say specifically. A thrombus due to infection, a thrombus due to one cause might form at a different rate of speed than a thrombus due to another, because it depends upon how much injury there is to the blood vessel, or the wall, by the infection or injury. It depends upon the clotting mechanism of the patient, it depends upon the rate of flow of the blood. There are many factors which affect the speed of forming thrombi and how it acts.

Q. Do you, as a physician, know, or have you read of any case where a thrombus has formed in a period of hours or minutes, or even in a matter of days?

A. A thrombus will form in days, yes.

Q. In a period of days, is that right?

A. Yes.

Q. Now, Doctor, will you describe to the Court the position of the blood vessels in the abdomen with respect to the aorta and vena cava and the other surrounding tissues that surround the aorta and other blood vessels in that area there where that saddle is that you have related?

A. Your vena cava and your aorta lie somewhat

(Testimony of Robert Scott Stokoe.)

side by side, one slightly in front of the other, coursing down through the abdomen to the pelvis where they both split and run along the pelvic wall toward the back and sides. They lie immediately [133] in front of the vertebral column. There is a layer of connective tissue over the vessels and then there are other attachments of other organs and such to that connective tissue.

Q. Doctor, I have had a figure in a book denominated as a Bodyscope, Plaintiff's Exhibit 7. With reference to the saddle you spoke about and the surrounding tissues and this figure, illustrate how this saddle is located in the body, and the branches of the blood vessels that you have been testifying about into the heart and the lungs and down into the legs of a person. A. Yes.

Q. Will you indicate to the Court the blood vessels that you have been referring to, that is, the aorta, vena cava and the heart, for the purposes of illustration?

A. The vena cava is extending upwards toward the right side of the heart in blue, your lungs are up here in the first wall, the blood vessels to the lung are demonstrated in blue, and the blood vessels back from the lungs in red to the left side of the heart, out of which the aorta arises here (indicating), crossing down behind the heart and extending down thusly (indicating).

Q. And what is the saddle you referred to, Doctor, as the location of the embolus, where is the saddle that you have referred to?

(Testimony of Robert Scott Stokoe.)

A. The saddle is at the splitting of the aorta, commonly [134] medically called the bifurcation of the aorta, and that is where the embolus primarily hit.

Q. Now, the figures to the left segregate the red blood vessels and the blue blood vessels?

A. As the arteries and veins, yes.

Q. And which one represents the veins and which one of the figures represents the arteries?

A. The red represents the arteries.

Q. And the blue represents the veins, is that right? A. That is true.

Q. That would then show the course of blood vessels into the leg, does it?

A. That is correct.

Q. From the saddle you have been testifying to down into the legs, is that right? A. Right.

Mr. Doepker: We would like to use this, your Honor, just for the purposes of illustration.

Mr. Angland: No objection.

The Court: Very well, it may be admitted for that purpose.

(Chart called Bodyscope, marked Plaintiff's Exhibit 7, was here received in evidence, and is on file in the Clerk of Court's office in this cause.)

Q. Now, Doctor, in connection with your treatment of the case and in getting the history of the case, did you learn of any accident, accidents, I will

(Testimony of Robert Scott Stokoe.)

going on in the patient's body secondary to the embolus.

Q. Those examinations or checks, were they a part of the laboratory record of the hospital record of this case? A. They are.

Q. And they are shown upon these records, are they? A. They are.

Mr. Doepker: Your Honor, we would like to offer as an exhibit—that is, not everything—the chart of the Deaconess Hospital, with the exception of the Nurses' Record.

Mr. Angland: Your Honor, I object to any exceptions of the offer. It is all one chart; I think it is all part of the record. The doctor has testified it was all made by him or under his supervision.

The Court: The plaintiff may offer that part of it that he wishes to offer. You can offer the rest.

Mr. Angland: Very well, I have no objection. I will offer the balance of it later.

The Court: It is admitted.

(Defendant's Exhibit 2, being the Deaconess Hospital [186] Record of Joseph P. Hennessey, was here received in evidence, with the exception of that part thereof designated as the Nurses' Record. It is impossible to reproduce said exhibit in this transcript, and the same is on file in the office of the Clerk of the Court in this cause.)

Q. You have previously testified to a hospital record of St. Vincent's Hospital of the plaintiff,

(Testimony of Robert Scott Stokoe.)

have you, Doctor? A. I have.

Q. And this record is the admission, or of the admission of the plaintiff to St. Vincent's Hospital on November 29th, 1949, is that right?

A. That's right.

Mr. Doecker: Your Honor, we offer in evidence the portion of the chart of St. Vincent's Hospital that has been marked—to save time, your Honor, we offer Defendant's Exhibit 1, the portion thereof 1-A.

The Court: Any objection?

Mr. Angland: No objection.

The Court: Admitted.

(Defendant's Exhibit 1-A, being St. Vincent's Hospital Record of Joseph P. Hennessey, commencing 11-29-49, was here received in evidence. It is impossible to reproduce said exhibit in this transcript, and the same is on file in the office of the Clerk of the Court in this cause.)

Q. Doctor, in connection with the record which is in evidence in connection with the plaintiff from the Deaconess Hospital, basing your answer upon your own personal observation and treatment of this patient, and the records that are [187] here in evidence, I want to inquire whether, on the occasion of his attendance in the hospital between the 3rd and the 6th day of January, 1950, and up until the 7th day of January, 1950, from your examination of the plaintiff's lungs, would you say that

(Testimony of Robert Scott Stokoe.)

there was or was not a reasonable possibility—not possibility—a reasonable probability that his lungs on that occasion was or was not a source of an embolus? A. It was not.

Q. And with respect to your examination and the records of this hospital that have been introduced in evidence, whether or not, on that occasion, and for over the same period of time, would you say whether or not there was or was not a reasonable probability that the patient's heart was a source of embolus on that occasion?

A. As a reasonable probability, it was not.

Q. You did find an embolus, or what you have diagnosed as an embolus, in the patient on the 7th day of January, 1950, is that right, Doctor?

A. Yes, sir.

Q. Then, where would you look, eliminating the reasonable possibility of a source of embolus in the lungs and eliminating a reasonable probability of an embolus in the heart, where would you say, from your examination, that would leave the source of the embolus?

Mr. Angland: Just a minute, the wording of that question, [188] your Honor, is such that I believe he stated the possibilities and probabilities here. I think he said eliminating one possibility and the other reasonable probability. I will object to the form of the question.

Mr. Doepker: I will amend the question as to reasonable probabilities.

Mr. Angland: I am going to object further as to

(Testimony of Robert Scott Stokoe.)

the reasonable probability as to where he might look for the embolus. I think the Court would take judicial notice of the fact that the embolus might at the outset form any place in the body.

The Court: Sustained. He can testify where he did look, what he found, and where he found it came from.

Mr. Doepker: Your Honor, that is just it. We have to do that by a process of elimination. There wasn't any way on earth to go and point a finger at exactly where it came from, but by a process of elimination and evidence——

The Court: Yes, that is very simple when you say, "I found it here," and why. It is very simple.

Mr. Angland: If the situation is as counsel stated, the doctor can't testify where it came from.

The Court: If the doctor doesn't know where it came from, but has an opinion as to where it came from, the doctor can testify as to that and give his reasons for his opinion.

Q. Doctor, in connection with this question, eliminate the [189] lungs and heart, in which you say there was no reasonable probability as a source, where would that leave as the diagnosed source, what part of the body?

Mr. Angland: I will object to that——

The Court: Where was the source of the embolus? Isn't it that simple?

Q. All right, we will ask it that way. What was the source of the embolus, in your opinion?

A. I can't state where the embolus arose; it is

(Testimony of Robert Scott Stokoe.)

impossible to state where it arose by anything short of an autopsy; I couldn't say where it arose. When we do eliminate the heart and we do eliminate the lungs, we can simply give an opinion that it may have arisen from the wall of the aorta as the only other remaining source, providing we also rule out a patent foramen ovale, which we previously discussed, through which an embolus could conceivably get from the venous side of the body to the arterial side. It is extremely doubtful, and it is extremely rare that an embolus gets from the venous side to the arterial side through this opening; so, if we rule out that as well, we know that it had to come from the arterial side, from the lung, the heart, or the aorta, as the only remaining sources. To the best of our ability we have ruled out the lung, to the best of our ability we have ruled out the heart. I still cannot say that this came from the aorta. It is reasonable that it may have come from the [190] aorta.

Q. I don't know whether I have asked you previously, Doctor, but will you explain the effect of an origin and development of an embolus?

Mr. Angland: Object to that as repetition, your Honor, I think that has already been asked.

The Court: I think so, I think you went into that, didn't you, Doctor?

Mr. Angland: Pages 25 and 26 of the transcript of yesterday's testimony of the doctor. I think the question was, "**Will you explain to the Court, Doctor, the known sources of blood clots that are**

(Testimony of Robert Scott Stokoe.)

known to your knowledge at this time, from your reading or experience, to the medical science?"

Mr. Doepker: This is directed to a specific thing, your Honor, that is, the formation of and development from the formation. I am trying to give your Honor all the medical assistance I can.

The Court: That is fine, if we don't already have it, but there is no use taking up the time if he has testified to it. If you don't think he has, proceed, however, because we are just wasting time talking about it. Go ahead, answer the question, Doctor.

A. An embolus comes from a thrombus, the thrombus being a clot, or later on, the residuals of the clot inside the lumen of the vessel. This thrombus itself, or its end product can break off and form an embolus, or a new thrombus can form over [191] the old thrombus, and the new thrombus break off and become the embolus.

Q. Now, then, Doctor, in your opinion, based upon your analysis of this case, will you say whether or not you found or believe that there was a thrombus that changed from a thrombus to an embolus in this case?

Mr. Angland: Just a minute, your Honor, I will object to that. The doctor has already testified that the embolus does form from a thrombus. He has stated that the plaintiff had an embolus. I will object to any questioning along that line, from his study of the case, because we don't know at this time how extensive the doctor's study of the case

(Testimony of Robert Scott Stokoe.)

has been, or that it covered all the facts presented in the case, not solely the medical evidence.

The Court: We don't know what the doctor is basing his opinion on. If you asked him to base his opinion on his testimony as to what he has related as to his diagnosis and treatment of the patient.

Mr. Doepker: That is all he can testify to is what he himself knows from his diagnosis.

The Court: Diagnosis and treatment of the patient, yes. Proceed and answer the question on that basis.

A. Will you restate the question?

(Question read back by Reporter.)

A. Yes. [192]

Q. And I now ask you to consider the effect of a serious history of nephritis that commenced with the hospitalization of Mr. Hennessey on June 25, 1934, diagnosed as acute glomerulonephritis, and from which the plaintiff was confined in the hospital at Butte, Montana, from June 25th, 1934, until October 20th, 1934, and with the subsequent history of their being present in the plaintiff evidences of nephritis which caused his rejection from the armed services, and that the rejection occurred in the year 1942, that degree and persistency of a nephritic condition, would that, in your opinion, with reasonable probability, have affected at all the walls of the blood vessels?

A. With the seriousness of his illness, there is

(Testimony of Robert Scott Stokoe.)

a reasonable probability of a minimal effect to the walls of his blood vessels of his body.

Q. If a person who has had that history of nephritis is struck upon the shoulder and neck by a man weighing between 115 and 130 pounds falling from a ceiling in a room that was 12 feet high while he was standing at a lavatory, bending over approximately to a 30-degree angle, and Hennessey being six feet and one-quarter inch high, would you say that an accident of that kind would cause extra pressure to be built up in the aorta?

A. Extra pressure would be built up in the aorta, yes, momentarily only. [193]

Q. Now, then, Doctor, do you have an opinion as to the reasonable probability of where this plaintiff may have had the origin of the embolus which you have testified to here yesterday in your testimony?

Mr. Angland: Just a minute; to which we will object, your Honor, it is repetitious; it is an attempt, I would almost say, to impeach his own witness. The doctor has already testified it is an embolus and to state where the embolus arose, in his opinion, it is impossible to state that.

The Court: I will overrule the objection. Answer the question.

A. I can't say where it arose. I can give a possibility with the aorta, or the lining of the aorta probably, there being, as stated, an increase in pressure as you have asked being present momentarily, it is conceivable that a tear, either minimal or

(Testimony of Robert Scott Stokoe.)

large, could happen in the wall of the aorta. Did it happen? I don't know; it is possible that it did happen.

Q. Is there, to your knowledge, any way, or any method that a physician can definitely state the source of a thrombus or where a thrombus forms inside of a blood vessel?

A. Under the conditions in this specific case, no.

Mr. Doepker: You may inquire. [194]

Cross-Examination

By Mr. Angland:

Q. Doctor, following through what you have stated just a minute ago, the momentary building of the blood pressure by being struck could affect the walls of the aorta. If an embolus was formed at that time, or a blood clot formed, it certainly couldn't possibly float around in the blood vessels for a period of several months, could it, Doctor?

A. Oh, no, the thrombus would be formed at that time, not the embolus, and it would either heal where it was or remain there for the future.

Q. It would attach itself to the wall of the aorta?

A. It actually begins on the wall and grows outward to a certain extent, dependent upon the rush of the bloodstream, that is, the speed at which it moves, and the ability of the patient's blood to clot, things of that nature.

Mr. Angland: Your Honor, under the present

(Testimony of Robert Scott Stokoe.)

state of the record in this case, I think I am unduly delaying the Court and counsel to cross-examine the doctor at this time. If there isn't more proof submitted, I think that I would be unduly delaying the Court and counsel.

The Court: That is for you to decide.

Mr. Doepker: We expect to put on additional witnesses, your Honor.

The Court: You probably won't be able to re-examine this witness at a later date. He ought to be examined here some time. [195]

Mr. Doepker: We are going to put on another medical witness, your Honor.

Q. (By Mr. Angland): Doctor, when this embolus formed in Mr. Hennessey on January 7th, 1950, did you consult with other physicians in the City of Billings? A. I did.

Q. Did you have a large consultation, or a small one; I mean, was there a number of doctors?

A. May I answer that in my own words?

Q. I would appreciate it if you would.

A. Specifically, there was the same day a consultation with a single physician, surgeon, who concurred in the diagnosis; there was at a later date—the case was brought up at a later date at a staff conference where there were many doctors present, I would judge 40.

Q. And Doctor, by reason of those conferences and your study of this unusual case—you have given it a good deal of consideration, haven't you?

A. Yes, sir.

(Testimony of Robert Scott Stokoe.)

Q. And a good deal of study, Doctor?

A. Yes, sir.

Q. And you cannot state definitely where that embolus arose in Mr. Hennessey's body, is that true?

A. That is true.

Q. It is possible to have had an injury when he was a child [196] and have the thrombus form somewhere, and that might have broken loose, is that true?

A. Before his nephritis, the chances of that would be quite minimal, I believe, unless it was a very, very severe blow. After his nephritis, that possibility does exist by reason of changes I believe have come about in the walls of his blood vessels, of his aorta, specifically.

Mr. Angland: Lest I forget, at this time, we should like to offer in evidence the balance of Defendant's Exhibit Number 2, that is, the portion of it not offered by plaintiff, and the portion of Defendant's Exhibit Number 1 not offered by the plaintiff, that part consisting of what has been identified, I believe, as 1-B and 1-C. I believe 1-A is the one that is offered and admitted.

The Court: Any objection?

Mr. Doepker: We don't have any objection to a portion of it, your Honor, but I do object to the portion of Defendant's Exhibit 1 that has been denominated as 1-B and 1-C, on the ground and for the reason that it is improper cross-examination and no foundation having been laid sufficient for the introduction of these subsequent exhibits, your

(Testimony of Robert Scott Stokoe.)

Honor, 1-B and 1-C being exhibits that came into the testimony yesterday subsequent to this condition that the doctor has testified to in the Deaconess Hospital. They are matters that occurred later, which might be a part of the defendant's case [197] in chief.

The Court: Well, it may well be that those matters that occurred later don't go to prove the cause of the embolism in this case or anything of that nature, but I suppose some time in the case we are going to get around to proving damages.

Mr. Doepker: That's right, your Honor.

The Court: They will be admissible then. For the time being I will sustain your objection, but I don't see what we are wasting time for arguing about it, because they are going to get in.

Mr. Doepker: Your Honor, we have a hypothetical question to deal with on those.

Mr. Angland: There is a rule where one party has offered a portion of an exhibit, the balance is admissible. These two exhibits were identified by the defendant as Defendant's Exhibits 1 and 2.

The Court: Yes, but they are obviously not part of the same document; they are three different histories kept by the hospital in one jacket.

Mr. Angland: That may be true. Now, further, the plaintiff has already testified, your Honor, concerning his condition right up to the present time. He has already gone into that, may it please the Court. The doctor was given an opportunity yesterday to review all of the medical records so he

(Testimony of Robert Scott Stokoe.)

might be in a position to testify yesterday afternoon. [198]

Mr. Doepker: To save time, we will withdraw our objection, your Honor.

The Court: Very well, admitted. Proceed.

(That portion of Defendant's Exhibit 2 designated as Nurses' Record of Joseph P. Hennessey at Deaconess Hospital; Defendant's Exhibit 1-B, being St. Vincent's Hospital Record of Joseph P. Hennessey, commencing 9-7-51, and Defendant's Exhibit 1-C, being St. Vincent's Hospital Record of Joseph P. Hennessey, commencing 11-14-50, were all here received in evidence. It is impossible to reproduce said exhibits in this transcript, and the same are on file in the office of the Clerk of the Court in this cause.)

Q. Now, Doctor, did you have an opportunity yesterday noon to study the record and history of the record of St. James Hospital and the history of nephritis? A. I have.

Mr. Angland: At this time, then, your Honor, we offer in evidence Defendant's proposed Exhibit 5.

The Court: Any objection?

Mr. Doepker: Is that the St. James Hospital record, your Honor?

Mr. Angland: Yes.

Mr. Doepker: No objection.

The Court: Admitted.

(Testimony of Robert Scott Stokoe.)

(Defendant's Exhibit 5, being St. James Hospital Record of Joseph P. Hennessey, was here received in evidence. It is impossible to reproduce said exhibit in this transcript, and the same is on file in the office of the Clerk of the Court in this cause.)

Q. Doctor, have you been acquainted with Mr. Hennessey since [199] his release, or have you treated him professionally since his release from the hospital, I believe it was the latter part of March, 1950? A. I have.

Q. Have you treated him from time to time?

A. I have.

Q. You have also examined the hospital record of Mr. Hennessey since that time, haven't you?

A. I have.

Q. Has Mr. Hennessey given himself the care that you would say had contributed toward his recovery from the condition that he suffered from in the hospital in January, 1950, or has his treatment of himself been such that he has aggravated the condition?

A. The damage was done in the hospital with the embolus and subsequent course of events while hospitalized. I would believe it would be impossible for him to make himself worse after that time; either there would be a small, a minimal recovery, or a great recovery.

Q. What I am getting at, Doctor, is this: Supposing that doctor examined Mr. Hennessey on De-

(Testimony of Robert Scott Stokoe.)

cember 26th of 1952, and January 10, 1953, to determine his present physical condition. Do you believe that by reason of the hospitalization which Mr. Hennessey received in 1951, as shown in Defendant's Exhibit 1-B, that Mr. Hennessey's condition might be found to [200] be worse than it was, say, on the day he was released from the hospital by you in 1950?

A. Found his condition to be worse?

Q. Yes. Would that hospitalization have aggravated his present physical condition, is it possible?

A. With regards to his leg and with regards to the reason that he was in the hospital, no, not the concussion.

Q. Not with regard to his leg, but with regard to his general physical condition?

A. It may have slowed improvement.

Q. It may have hampered improvement and recovery from the condition of the leg?

A. Yes, indirectly.

Q. The injury he received at that time, could that have affected his general physical condition as of now? A. Not as of now, no.

Q. You think he has fully recovered from the concussion? A. Yes, I believe so.

Q. You would say that the only thing that that did, then, was delayed the recovery of the condition in the leg?

A. A temporary delay, that is correct.

Q. Doctor, directing your attention to Plain-

(Testimony of Robert Scott Stokoe.)

tiff's Exhibit 1-C, I believe you were the plaintiff's doctor on that occasion, weren't you?

A. I was. [201]

Q. When was that hospitalization?

A. November 14th, 1950.

Q. That was the fall after you had released him with this condition in his leg?

A. That is correct.

Q. What was Mr. Hennessey's condition when you admitted him to the hospital?

A. Do you wish the diagnosis?

Q. Yes.

A. The diagnosis was alcoholic poisoning.

Q. Had you observed Mr. Hennessey from time to time between the date he was released in March, 1950, and his admission in November, 1950?

A. I had.

Q. Had Mr. Hennessey been doing anything you considered was aggravating his condition, his general health?

A. There was neglect of treatment, yes, during that time, the same reason that he was hospitalized causing the neglect of treatment, I believe.

Q. To your knowledge, the excessive use of alcohol between the latter part of March, 1950, when you released him from the hospital, and the time you admitted him to the hospital in November, 1950, was causing a neglect of treatment?

A. That is correct.

Q. Is that all it amounts to, or was the condition such that [202] he was preventing nature from

(Testimony of Robert Scott Stokoe.)

rendering what aid nature might render toward recovery? A. That is true.

Q. When that occurs over a period of several months, Doctor, is that probably going to prevent or make it more difficult for nature to cause his complete recovery, or is it not?

A. That is true.

Q. Just tell us how that affects the condition, Doctor, or the recovery from the condition?

A. Accompanying that condition there is a general malnutrition due to the lack of proper food and proper vitamins. Your protein and various food elements, and your minerals and vitamins are required for tissue repair, that is, for new tissue to be built. Excessive use of alcohol will cause—is nearly always, we will say, accompanied by lack of proper diet, which would naturally impede recovery from any condition.

Q. Rather than recovery, you may get additional deterioration, isn't that the situation, Doctor, from excessive use of alcohol?

Mr. Doepker: Just a minute, your Honor, we object to this line of cross-examination on the ground and for the reason it is calling for speculation.

Mr. Angland: I am trying to find out, your Honor, what his present condition is, and whether he has aggravated his damage. [203]

The Court: The doctor has testified as to Mr. Hennessey's health and condition right up to the present time. Didn't he testify with reference to

(Testimony of Robert Scott Stokoe.)

his general health and general condition today, or just right up to the time of trial? Now, surely, you can cross-examine him in any light, in any way that will throw any light upon his condition and what it results from, because, after all, we just don't close our eyes to what we are trying here. We have got to find out not only what happened in the past, but what our damages are. Now, if damages resulted from something different than the fault of the defendant, why, then, that is an important part in the case, and I take it that is what we are looking into on this cross-examination.

Mr. Angland: That is what I have in mind, your Honor.

The Court: Objection is overruled.

A. On his general physical condition, you will get a deterioration throughout the body.

Q. That is what I meant. Bearing in mind the malnutrition you spoke of from the excessive use of alcohol, so that you get a general breaking down of the health, rather than a recovery of the limb that needed particular treatment, isn't that right, you get a breaking down of the general health?

A. That is correct.

Q. And that, of course, affects the member of the body that has been injured? [204]

A. That is correct.

Q. Now, Doctor, how long did you hospitalize Mr. Hennessey in November, 1950?

A. One week, November 14th to November 21st.

Q. For one week. Doctor, did you continue to

(Testimony of Robert Scott Stokoe.)

treat Mr. Hennessey after his release from the hospital on November 21st, 1950, did he continue to be your patient? A. Yes, he did.

Q. Now, with respect to caring for himself, particularly as to his continuing the excessive use of alcohol, or not continuing it, Doctor, what do you know about that situation?

A. Up to January of—the month of January, one year ago.

Q. 1952?

A. There were periods of excessive use of alcohol, followed by periods of abstention.

Q. How often, if you know, did these periods of excessive use of alcohol occur?

A. To the best of my knowledge, I can only answer that as frequent.

Q. As what?

A. I cannot be specific as to the number of times.

Q. Give us your best estimate.

A. Since January of one year ago, I am satisfied there has been total abstention.

Q. I mean between the release from the hospital on November [205] 21st, 1950, and January, 1952, what was the situation?

A. As I have stated.

Q. There were periods of excessive use and periods of abstention. How often did these periods of excessive use occur and for what length of time, if you know, accurately, if you can, if not, give us your best estimate, Doctor?

(Testimony of Robert Scott Stokoe.)

A. My best estimate would be probably periods of a couple of months, possibly two or two and a half months duration, it would be roughly in there, of excessive use, followed by a week to possibly a month and a half to two months abstention.

Q. Now, Doctor, then, from the time that you released Mr. Hennessey from the hospital in March of 1950, until January of 1952, did you find a steady improvement in his general health, or a deterioration, or just what was the situation?

A. I would say that his general health remained stationary during that period. There was no improvement. Because he had been so ill in the hospital, if there was retardation—not retardation, but if there was a further injury to his general health, I would estimate that he, undoubtedly, with the use of alcohol, his general health did go down hill somewhat, but then reached a stationary point. In other words, he was not severely worse in January of 1952.

Q. He was not severely worse, but the body had not been given the nourishment that permitted more speedy recovery of the left leg, is that true, or is it not? [206]

A. That is true.

Q. Had he given himself the care that you recommended, and given nature an opportunity to cure, you would have, or would anticipate a more speedy recovery, is that right, Doctor?

A. I never anticipated a complete recovery.

Q. No, I don't mean that. What I am trying to get at, Doctor, is this: Was the excessive use of

(Testimony of Robert Scott Stokoe.)

alcohol causing an aggravation, was it maintaining the condition of the leg in a static condition, so to speak, or was it improving the condition of the leg?

A. Because of periods of abstention and physiotherapy received, his leg did improve. In answer to your question, it did not improve as far as I think it would or may have.

Q. If he had abstained from the use of alcohol?

A. That is true.

The Court: Doctor, you have talked about infection being a source of emboli, is that right?

A. Yes, sir.

The Court: And you were asked about the infection that the patient suffered in the month of January, 1950, in the lung, in the chest area, or respiratory infection; wasn't there such an infection at that time?

A. There was at that time.

The Court: In your further testimony you said in your opinion no emboli came as a result of that infection, is that right? [207]

Mr. Angland: He said he didn't know.

A. Yes.

The Court: Let's find out, that is what I want to find out. What is the situation on that, that is what I want to know?

A. We know when there is any infectious going on in the body that in all of our blood streams there are bacteria present for a short period of time, and for which the various elements of the blood are there to combat that. It was not felt by this group

(Testimony of Robert Scott Stokoe.)

of physicians, nor by myself, that his infection was the source of the embolus.

The Court: Why?

A. Before infection will play a part in causing an embolus or a thrombus, there must be some type of damage within the walls of the blood vessels, within the lining, I should say, so that it is conceivable to me that were there a thrombus, that is a projection outward inside the blood vessel, were there a thrombus present, it is conceivable that bacteria could lodge in that thrombus and further propagate, further increase the thrombus, but, as I have said, you need an injury in the lining due to infection to have the eroding get from the tiny blood vessels into the lining, and it was not felt, as I say, by myself—we have not seen where this infection had been severe enough to cause it alone.

The Court: Is that the answer, then, the infection in this case was not severe enough to cause a thrombus to form from [208] which the emboli resulted?

A. We felt that way, sir.

The Court: Tell me what kind of infection is necessary to do that?

A. In general, one which is prolonged; and one which is severe is one in which the elements of the blood, plus what medication we can use, will not readily clear the infection, such as a long standing severe infection in the body, a brain abscess.

The Court: How long standing and severe does the infection have to be? With reference to this

(Testimony of Robert Scott Stokoe.)

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(Testimony of Robert Scott Stokoe.)

case we have got, didn't you have the patient in the hospital a month previous, about a month previous, with the same general infection or type of infection?

A. That is true. It was felt—that is a very difficult question to answer. I can give you the opinion that it was felt that were the infection the source of embolus, positive X-ray findings would have been found at that time, sir. Does that help; and they were not found.

The Court: X-ray pictures at the time shortly after the embolism hit the knee, is that right?

A. Yes, that is true. There were X-rays on the previous hospitalization, if you remember, at St. Vincent's, that were read as minimal changes in the lung, to which no significance was given, then, this X-ray was taken as we were searching [209] for the source of this.

The Court: Where?

A. This isn't the Deaconess record, I am sorry. They were taken in the Deaconess Hospital shortly afterward. I have taken several X-rays of Mr. Hennessey's chest, one of which I sent to Dr. Terrill in Galen for review, and he found no——

The Court: In order for a medical man to say that an emboli resulted from a respiratory infection, there would have to be something show in an X-ray, then, in order for a doctor to say that is where it came from?

A. That was our belief.

(Testimony of Robert Scott Stokoe.)

The Court: Is that medical science, is that what they all say, or is there some argument about it?

A. I heard no argument about it; I have to go by inference.

The Court: So far as you know, there would have to be a showing in an X-ray of damage to the lung cavity for anyone to say that an emboli did result from that infection? A. Yes, sir.

The Court: While it takes that to say it did result, does it take that to say it may probably have resulted, or could have resulted, is there anything to that? In other words, while it may take positive showings in X-rays to say, "Yes, it did result from that infection," does the absence of positive showings prove or establish to the satisfaction of medical science that the respiratory infection was not the [210] source of the emboli?

A. You would have to have—I think I can answer that for you satisfactorily. In order to have an embolus large enough to lodge in the bifurcation of the aorta, in other words, it has to lay over the top, so to speak, in order for it to be that large, I believe, and at this meeting it was also believed—I should not say that, I can't specifically—but I do believe, nevertheless, that the embolus would have to come from a fairly large vessel. Were that vessel to be in the lung, there would have to be positive X-ray findings before we could say it came from there. That is my opinion. Does that help?

The Court: Yes. Any further questions.

(Testimony of Robert Scott Stokoe.)

The Witness: The X-rays of the chest were taken January 3rd and February 19th, 1950.

Q. (By Mr. Angland): Those X-rays you took, Doctor, were limited to the lungs and the wall of the aorta, is that right?

A. Yes, from the diaphragm up, yes, sir.

(10-minute recess.)

Q. Doctor, this respiratory infection, which you were speaking of a few minutes ago, was the condition that you found when you hospitalized Mr. Hennessey in the fall of 1949, is that right?

A. Yes, sir.

Q. And that was the only condition you found Mr. Hennessey was suffering from at that time? Do you want to look at the [211] chart?

A. May I refer to it, please, 1-A?

Q. In November of 1949?

A. That was not all. At that time on entrance I also thought that he had some liver damage which I could not substantiate with tests, even though it was apparent that his liver was large and tender. I also found a mild hypertension.

Q. What do you mean by mild hypertension, Doctor?

A. That his pressure was elevated above normal.

Q. Blood pressure? A. Yes, sir.

Q. Did you find a cause of that?

A. I did not find the cause of it. His hypertension has varied, as I believe his charts will show, which could be at times the result of alcoholism. It

(Testimony of Robert Scott Stokoe.)

could be also the results of the residuals of nephritis.

Q. Doctor, when you admitted Mr. Hennessey on January 3rd, 1950, when you admitted him to the hospital again, you found that this respiratory infection, as you call it, the upper respiratory infection, had not completely cured from the time he had been in the hospital in November of 1949, is that right? A. That's right, that is correct.

Q. There was still respiratory infection present?

A. He had a persistence of coughing.

Q. Did you still find the liver tender? [212]

A. I did not.

Q. That condition seemed to have cured?

A. It apparently had cured.

The Court: Doctor, in your consideration of the care and treatment and diagnosis of the case with particular reference to the embolus, did you consider the history of the infection as the result of the nephritis?

A. Did I consider the history of the infection as the result of the nephritis?

The Court: Did you consider the nephritis, which is an infection, is that not so?

A. The cause of nephritis today is not known.

The Court: What is nephritis?

A. It is an inflammation of the kidney.

The Court: Is that an infection?

A. It is not a bacterial infection, no.

The Court: Is it the kind of infection that could build up a thrombus or cause a thrombus?

(Testimony of Robert Scott Stokoe.)

A. In itself, no, but through changes in other vessels, it can make the vessels less elastic and make them a potential source for something else to happen, or over a long period of years to change the vessel walls to form arteriosclerotic plaques along the course of the major vessels.

The Court: Did you make any examination to see if such condition existed? [213]

A. It is impossible, with the exception it will sometimes show up on X-ray. Either X-rays were not made, or if they were, whatever chest X-rays and lumbar spine were taken—that's right, on the Deaconess records there were pictures taken, and were there arteriosclerotic plaques present with calcium in them, they will then show up on the X-ray, provided the calcium is present, which does take a considerable period of time, the exact number of years I can't give you.

The Court: Do they exist without calcium being present?

A. For a period of years, yes.

Q. (By Mr. Angland): You don't know whether the calcium was present in the case of Mr. Hennessey, or whether it wasn't?

A. I doubt that there was in the lumbar spine. X-rays were taken, and I don't recall, I am quite certain there is no mention made of that being present.

Q. You did find, didn't you, I believe you stated, two old fractured transverse processes on the left?

A. That was my impression at the time. I have

(Testimony of Robert Scott Stokoe.)

not since reviewed the films. The radiologist did not believe they existed, and I took his word for it because other shadows can overlies those transverse processes and give you a false impression of a fracture. As I remember, I read the films when they were wet and they are more difficult to read unless they are dry, so I put no significance on my findings.

Q. And, Doctor, I am trying to find it in here, and I can't [214] find it immediately, but I think you said there were residuals present as far as the nephritis is concerned, the history of nephritis of Mr. Hennessey?

A. I believe there were, yes, sir.

Q. There could have been a thrombus formed from those residuals, is that right?

A. By themselves—I mean by the residuals that I believe were present by themselves without other factors, I don't believe so. That is strictly a belief.

Q. If other factors you are speaking of are present, they could form a thrombus?

A. That is possible.

Q. It is possible? A. Very possible.

Q. There are just many possibilities for forming a thrombus, aren't there?

A. That is correct.

Q. If you got out one of your medical books, I suppose you could list quite a number of possibilities for the forming of thrombi?

A. I got out some books, and I think we have covered just about anything that I found.

(Testimony of Robert Scott Stokoe.)

Q. You have covered most of them since you have been on the stand, have you?

A. I believe I have. [215]

Mr. Angland: No further cross-examination.

The Court: I would like to have you examine the witness further along the line—counsel on direct examination inquired as to the injury, the falling on the shoulder and the neck of the defendant. There is some evidence that a couple of years prior to that there was another injury to the shoulder. I would like to have you examine the witness with reference to that.

Mr. Angland: You are referring, I believe, your Honor, to the automobile accident?

The Court: The automobile accident.

Mr. Angland: I thought it was Dr. Soltero that testified about having treated him for both those injuries.

The Court: This witness was asked with reference to an emboli resulting from a person falling 12 feet and striking him on the shoulder and back. Isn't there some testimony with reference to that?

Mr. Angland: I thought the Court sustained an objection to that.

Mr. Doepker: No, he has testified about the pressure causing a tear in the wall.

The Court: Yes.

Q. (By Mr. Angland): I think I inquired of you, Doctor, that it is possible from a fall of that kind such as you were inquired of, concerning a fall of that kind, Doctor, it is possible [216] to get

(Testimony of Robert Scott Stokoe.)

a tearing that might cause a thrombus, is that right? A. That is correct.

Q. You wouldn't have an embolus immediately, as I think I have already asked you, the embolus just wouldn't float around in the blood stream from June 2nd, 1949, until January 7th, 1950, that is an impossibility, isn't it? A. That is correct.

Q. You have stated you couldn't have a thrombus form in the right shoulder and go down through the heart into the lungs, back into the other side of the heart and down the aorta?

A. That is correct.

Q. You have stated that that just isn't possible, isn't that right, Doctor?

A. Not through the lungs by the channel that you have stated. The lungs will filter out such an embolus.

Q. Isn't that what the course of the blood would have to be, Doctor?

A. Unless there were an opening from the right side of the heart to the left side of the heart.

Q. Does Mr. Hennessey have such an opening?

A. Not to my knowledge, no.

Q. That is an unusual condition, is it?

A. I think when we looked that up we found there was some type of an opening in one out of 20 autopsies, but to the point of being clinically significant, it was much more rare than that. [217]

Q. I think you have already testified you found no heart condition so far as Mr. Hennessey was concerned? A. That is correct, sir.

(Testimony of Robert Scott Stokoe.)

Q. Is it possible to have that opening without a heart condition? A. To some degree, yes.

Q. I think you further stated that in your opinion the embolus in this case was too large to have gone through that course of the body from the right shoulder down to the saddle, as you call it, in the aorta? A. I believe so.

Q. So, that in your opinion, Doctor, there was no thrombus formed on the right shoulder that caused this embolus?

A. Not causing the embolus, no, sir.

Q. It just couldn't have happened, isn't that the situation, in a normal human being, it couldn't happen, is that it, Doctor? A. That is correct.

Mr. Angland: Does that cover what your Honor had in mind?

The Court: I didn't have anything in mind.

Mr. Angland: What you suggested. I believe that is all.

Redirect Examination

By Mr. Doecker:

Q. Doctor, you have been asked concerning a subsequent [218] history of Mr. Hennessey which related to the use of alcoholic liquor. In that respect do you recall that during the time that Mr. Hennessey was confined in the hospital whether or not, because of the great amount of drugs that were administered to him, that he, himself, requested they be not used further on the ground they might be habit forming, that he, himself, discontinued to

(Testimony of Robert Scott Stokoe.)

take the narcotic drugs in the nature of morphine and pain-killing drugs?

A. With respect to morphine, that's right.

Q. Because of the excruciating pain, did he not substitute whiskey instead of these narcotic drugs?

Mr. Angland: I will object to that as leading and suggestive, your Honor.

The Court: Overruled, you may answer.

A. He may have done that, yes.

Q. And with respect to the damage that was done in the hospital there, this that you have related to the Court, do you feel that that condition that resulted from the embolus and the effects of it could have been permanently cured so that he would be free from pain?

A. So that he would be totally free from pain at all times, I don't believe so.

Q. And—pardon me, I didn't mean to interrupt you, Doctor.

A. I was just going to try to help in that. I feel now, and I felt then, that, as I have stated before here, I think there could have been more improvement than there has been. I would not anticipate that there would be a complete cure in his leg to the point that he could partake of any heavy exercise, so to speak, such as hunting or long walking, without getting into further pain, and I believe that his leg would be always limited to some ability, to some point, I should say.

Q. And that is regardless of any subsequent history of partaking of alcoholic liquor, he would still, in your opinion, if he had not indulged to the extent

(Testimony of Robert Scott Stokoe.)

that has been shown here—would you say whether or not, in your opinion, that he would still have difficulty in walking and climbing stairs, for instance, to the courthouse here in Billings, and things of that kind?

A. Exactly what further limitations he would have had, to define it to a fine specific point, I believe, is impossible. I can't really define it any more than I have generally. As I say, I don't believe he would be able to hunt. Whether he would be able to walk from his office to here and up these stairs, I can't say.

Q. I neglected to ask the doctor's attention to a statement. Doctor, did you prepare an itemized statement of your professional care in the Deaconess Hospital from January 3rd through March 12th, and continuing on until the 10th of May, 1950?

A. I did. [220]

Mr. Angland: When did that bill commence?

Mr. Doepker: January 3rd.

Q. Showing you Plaintiff's Exhibit 10 for identification, Doctor, is that the statement you have rendered for your services?

A. That is the statement.

Q. And for those services—was that the reasonable value of the services which you performed for Mr. Hennessey?

A. I believe it was reasonable.

Mr. Doepker: You may inquire.

The Court: Do you wish to offer that?

Mr. Doepker: Yes, your Honor.

Mr. Angland: No objection.

PLAINTIFF'S EXHIBIT 10

"STATEMENT OF YOUR ACCOUNT

Itemized Statement Furnished on Request

Date	Services	Debits	Balance
1/ 3/50			
to			
3/12/50—Prof. Care, Deaconess Hospital.....		\$250.00	\$250.00
3/16/50—House Call		5.00	255.00
3/23/50—Office Call		3.00	258.00
4/ 1/50—X-ray Ankle		7.50	265.50
4/24/50—I.V. Inj.		5.00	270.50
5/ 4/50—Office Call		3.00	273.50
5/ 5/50—Office Call		3.00	276.50
5/10/50—Chest X-ray		10.00	286.50

Accounts Due and Payable by 10th of Month Following Service Unless Arrangements for Terms and Credit Are Made With Credit Dept.
This Statement Includes Your Account to the 26th of the Month Only.

In Account With
Soltero Medical & Surgical Group
315 North Broadway
Billings, Montana

Joe Hennessey." [221]

Mr. Doepker: That is all. May the doctor be permanently excused? He has got a trip to take.

Mr. Angland: Yes, as far as I am concerned.

C. H. HORST

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Doepker:

Q. Will you please tell the Court your name?

A. My name is Dr. C. H. Horst.

(Testimony of C. H. Horst.)

Q. Where do you reside, Doctor?

A. I come from Butte, Montana.

Q. And have you resided in Butte, Montana, for some time?

A. Yes, pretty near all my life.

Q. How long have you been following your occupation in Butte, Montana?

A. Oh, about 50 years.

Q. What is that occupation you are following?

A. I am a physician and surgeon.

Q. You are a graduate, Doctor, of what School of Medicine?

A. Johns Hopkins Medical School. [245]

Q. After you attended, and while you were attending Johns Hopkins Medical School, did you study the complete course of study that was prescribed by that institution for graduation in the profession of medicine and surgery?

Mr. Angland: I will admit the doctor's qualifications as a physician and surgeon, that he is regularly licensed and practicing his profession in the State of Montana.

Mr. Doepker: Thank you. Doctor, I would like to inquire some about your experience subsequent to your graduation from the University. Will you just relate briefly your experience in the field that you have chosen as your life's work?

A. After I graduated, I was a year in the Johns Hopkins Hospital as House Officer, I guess you would call it House Officer, it was an intern. Then I came to Butte in 1903 and took the examination;

(Testimony of C. H. Horst.)

then I fussed around and went down to the Montana State Insane Asylum for a year; then I got married.

The Court: Before or after you went to the Insane Asylum?

A. When I got down there; then I went to Butte again, and then I had charge of the City Hospital in the City Jail, in the City Hall; I had that for five years. We were very active then in Butte; everybody was taking poison or shooting each other, so I saw quite a good deal of cases; and then I went back to general work. I'll tell you in 1900 I went down to Boston and I took a course there in pathology under a very famous doctor—I have forgotten his name right now—and then [246] I have been to New York frequently to see the good surgeons operate, and Mayo's innumerable times; I went there to look on with patients. I have been around about 50 years, and here I am.

Q. In the course of your experience as a physician, did you have occasion to consider the blood vessels of human beings, and to study their form and substance and so on? A. Yes, sir.

Q. And have you read, and do you make it a practice of reading on various subjects connected with your profession, as a part of your work, I mean? A. Yes, sir.

Q. Have you studied the question of thrombosis in blood vessels?

A. Yes, I have had quite a great deal of experience.

(Testimony of C. H. Horst.)

Q. Also have you studied the question of when the thrombus dislodges and goes into the blood stream and changes from a thrombus to an embolus, have you studied those things?

A. Yes, you have to know about those things if you study medicine.

Q. All right, then, going on from your experience, I want to inquire whether you, in the course of your practice, had occasion to meet and have the plaintiff in this case consult you with reference to a complete physical examination and study of his case? [247]

A. Yes, sir.

Q. And in response to that meeting with the plaintiff, did you make a complete physical examination of him, and also of his case?

A. Yes, sir.

Q. In doing that, what did you have available, what did you have available to study the facts of his case?

A. Well, first of all, I had the patient. Then I started in on him. I took his history, and the history consisted of carrying Mr. Hennessey from the time he began to get sick until he reached this present state, and I went into his family history and took his own history and reviewed the history in relation to accidents that he had sustained; then I made a careful examination of his history regarding this man that fell on him; then I made my own examination of him, and then I made my conclusions on this case.

Q. Did you have the benefit during the course

(Testimony of C. H. Horst.)

of your study of his case, Doctor, of the Defendant's Exhibit Number 2? A. Yes, sir.

Q. Did you have that available to you during the course of your examination and study of this case, and during your examination of the plaintiff?

A. Yes, sir.

Q. And you reviewed that exhibit, did you, sir?

A. Yes, sir. [248]

Q. Subsequently, did you review or examine Defendant's Exhibit 5, which I believe is a record of Mr. Hennessey with the St. James Hospital in the year——

A. That is the nephritis case?

Q. With particular reference to the nephritis, yes? A. Yes, I looked over that.

Q. And then on today, Doctor, did you examine Defendant's Exhibit 1-A, which I believe is in evidence here as a hospital record in St. Vincent's Hospital for a period from the 29th of November, 1949, to December 4th, 1949, did you look that record over? A. Yes, sir.

Q. A hospital record related to laryngitis?

A. Yes, I saw that, it is not important.

Q. Now, Doctor, in this examination that you have testified to, did you have Mr. Hennessey on more than one occasion to do this work?

A. Yes, I saw Mr. Hennessey twice. He came in one day and he told me about his case, and I examined him, and then I didn't see him again for about two or three weeks, and then on January 10th, he came in and I gave him his examination; I took

(Testimony of C. H. Horst.)

his history and studied the case and reported the case afterwards and reviewed all of his history as he gave it to me.

Q. Now, Doctor, for a proper diagnosis and study of a [249] condition of a patient, will you say whether or not the history is an important item for a physician to study, and was it in this case an important item for you to study?

A. Well, if you are going to examine a patient, you have to take a history. If you don't take a history and you just examine him for what he comes for like you have to do lots of times, you can't understand a case like this. This is a very difficult case, because there are here involved, first of all——

Mr. Angland: Just a minute, now, Doctor, I think you have answered the question. You said the history was important.

A. Yes, that's right, it is important.

Mr. Angland: I think that is the answer to the question. You have answered the question. We don't want you to go onto say——

A. We have come pretty far, and I would like to get through.

Q. Will you relate to the Court what you did in connection with this examination, including the history you received, will you relate that to the Court, please tell it? A. What I found?

Q. No, tell us your history and the result, and the method of your examination, the complete detail of it?

(Testimony of C. H. Horst.)

A. Well, I thought I had already explained that. I met the patient and took his name and his age and then I asked him what he was suffering from. Now, then, do you want me to go [250] on—then I pursued the course I explained to you a few minutes ago.

Q. I would like to have you tell us the items you considered so it will be in the record, so we will know what you took into consideration.

A. Then, after I found out what he was complaining of at the time he came to my office, then I asked him about his family history; then I took up his personal history. His personal history consisted of reviewing the various illnesses from which he had suffered in a reasonable—since he was a young man; then I reviewed the history of the accident that he had in Pocatello, and then I asked him about his—I asked him about his subsequent history, and then I made my examination, and then after I examined him, I made a resume of the notes I had taken, and then I concluded what was wrong with him.

Q. Will you give us the substance of that examination, tell us the substance of it, all the examination, at this time?

Mr. Angland: Just a minute, if the Court please, I don't think the doctor has given us sufficient information as to the history as he knew it. He has advised us of the importance of the history, but he hasn't told us what history the plaintiff related to him, your Honor.

(Testimony of C. H. Horst.)

Mr. Doepker: That is what I am asking for right now.

The Court: Very well. [251]

A. Then, I will make it more definite. Now, his family history, his father died in 1942, and he didn't know what he died of; his mother is living and well; he has two brothers, one, age 21, killed in the war, and one aged 33, living and well. He has one sister; she is living and well, and he has no dead sisters; and there is no tuberculosis, insanity, epilepsy, cancer in his family history. His occupation is attorney; he graduated from Montana Law School in Missoula, Montana, in 1943, at age 26; he took a prelaw course at the School of Mines, Butte, Montana, 1938, and at the University of Montana in 1939; he had a legal course at the Montana Law School, 1939-1943; he received a degree, L.L.B. He has a B.A. Degree, University of Montana; 1943 he was licensed to practice law in Montana. He took part in college athletics, sports; he has no hobby; he always enjoyed good health; his appetite is good; bowels, regular; sleeps well. He has been able to sleep for the past eight months. He can do his office work now, but had considerable trouble in his back left leg when he has law cases before the court and investigating cases; right leg only bothers him when walking. He has a specially made high heel shoe; right leg only bothers him when walking; calves of both legs pain him when walking; wears special made high heel shoe to compensate for the abnormal position of his left foot. Now, his birth history, his

(Testimony of C. H. Horst.)

birth, normal; he had measles, mumps and colds when a child; never had scarlet fever, [252] diphtheria, St. Vitus' dance, cholera, rheumatism, heart disease, or poliomyelitis. In 1933, while a high school student, he contracted pneumonia, which was complicated by acute nephritis. He was in the hospital in St. James for six months; he made a good recovery; later he was rejected by the Army and Navy and Air Corps in 1942, based on the fact that he had suffered from nephritis. He passed the Air Corps examination once and flew for three months, and the Civil Aeronautics Authority. He passed the Army examination in Butte once, but was rejected later in Missoula, reason, history of nephritis. He had an attack of acute nephritis, or acute laryngitis in November of 1949; in the hospital five days, made a good recovery. Beverages from the time he left school—at the time he was injured in Pocatello, Idaho, he drank whiskey moderately occasionally; he drank to excess in March and April, 1951; he drank too much; he wound up in the hospital for a week, he was treated for alcoholic poisoning; after he left the hospital, he quit drinking in May and June, drank moderately in July, excessively at the end of August. At this time he was hit on the head and was hospitalized from September to October, 1951, suffering from concussion of the brain. "I lost my equilibrium and suffered from headaches. I was dismissed from the Hospital October 1, 1951, and resumed my work November 1, 1951. Have done no drinking since." Accidents:

(Testimony of C. H. Horst.)

“Automobile accident in 1947, going to Three Forks. I rolled my car over [253] between Toston and Three Forks, injured right shoulder, couldn't lift my right arm up, wrenched muscles and nerves, X-rays negative; absent from office four days, suffered from the shoulder six months. In plane crash in Butte, 1948, Northwest Air Lines, no passengers injured, belt I wore injured my abdominal muscles; no doctor consulted; took plane next day for Billings, Montana; arrived; I went to work, no subsequent complaints.” History of accident in Pocatello, Idaho, June 2nd, 1949, “I was out in the airport at Pocatello, Idaho, waiting to take the two p.m. plane to Butte; went into rest room; I was washing my hands and suddenly an object, which was a man, fell from above me, striking me across right shoulder and lower back; shook me; I didn't go to the floor; I brushed myself off; talked to a fellow who fell on me and to another man who was standing near me. He asked me if I was hurt. I told him my shoulder pained, but I was all right. I also told the fellow who fell on me it was a good thing he wasn't a lot bigger, or he would have crushed me. The man who was standing there and myself went out to the desk and told the girl at the desk about it. I told her except for my right shoulder, I didn't think I was hurt. I took the plane and came to Butte. The next day I went home to Billings. My right shoulder was stiff and sore, and I consulted Dr. Soltero, an M.D. He gave me three diathermy treatments for my shoulder and let it go at that. He

(Testimony of C. H. Horst.)

told me it was the type of injury that a medical doctor [254] couldn't do much with, and that whenever it bothered me again to go to a good osteopath and have it rubbed out. After that I had a nurse rub it when necessary. I did not need my shoulder in my work, so I just let it go. November, 1949, I had a severe attack of laryngitis. I couldn't talk. Confined to St. Vincent's Hospital in Billings four days; made a complete recovery. January 3, 1950, I had another attack of laryngitis, bronchopneumonia on the hospital record. Dr. R. S. Stokoe sent me to the Deaconess Hospital, Billings, Montana. January 7th, 1950, Dr. Stokoe told me I could leave the hospital. I got up and prepared to go to town. I was partially dressed when suddenly my left leg went numb. I reported to the nurse who was in the room as she was making the bed for the next patient. She told me it was all right, that I had been in bed for three days, so I went back into the bathroom to brush my teeth, and came back out and suddenly both legs were numb, and I keeled over. The pain was severe, and I don't know what happened—"I lost my place—"I don't know what happened for several days. When I became aware of my surroundings, how long it was, I don't know, I noticed I was in bed, and the bars were up on the bed. The supervisor of the nurses came in and said the bars on the bed would have to stay up for a few days. All I know, I had a terrifically bad pain in my left leg, and I couldn't bear to touch it. It was

(Testimony of C. H. Horst.)

covered with a hood to keep the bed clothes from touching [255] the skin. The legs would go into spasms when I lay there, it just jumped like that. The spasms would last five or 10 minutes, sometimes longer. When these attacks came on, they gave me hypoes. These attacks lasted as long as I was in the hospital, and even now they come at night if I am unusually tired. During the day, these spasms come on. They last a few minutes and then go. When I was in the hospital, at first the pain would shoot down my left leg to the foot, and my right leg would extend involuntarily and push with great force against the foot board of the bed; the left leg did not move. This kept up for six weeks while I was in the hospital, and after I left the hospital even, these attacks were very frequent, 10 to 20 a day; they would last two or three, sometimes 10 minutes at a time. They kept up night and day. I was under sedatives most of the time, I think. I had the sedative cut off myself. I was worried, I feared it was too much. For the entire year I hardly slept at all because of these pains. The doctor told me I had forgotten how to sleep, and he didn't know what I was going to do. I took Buerger's treatments—"Buerger is the name of a doctor—I took Buerger's treatments and physiotherapy, rubbing and manipulation in the hospital. A week before I left the hospital, I was sent to the Billings Clinic, where I received hydrotherapy. I took this treatment all summer after I was discharged. For awhile I took it every day, then they cut it to [256]

(Testimony of C. H. Horst.)

three times a week. This continued all summer. Then, I quit of my own volition against the doctor's orders. At first after I left the hospital when I would go from my room in the hotel to my office across the street, my left leg would swell up, turn purple and pain terrifically. When I elevated my leg in the office, the swelling and color would go away, but the pain remained. At the present time, the bottom of my foot aches like a toothache, and my leg from its middle to the foot feels about half asleep. Sympatheticectomy has been recommended. I can't sit for any length of time without discomfort, nor stand for any length of time, even now, without pain. When I elevate my foot and rest it on my desk or chair, I am relieved of pain. The left foot is deformed. It is held in rigid flexion. There is present very moderate inversion and lateral motion, and some additional flexion beyond that already present. It is impossible to extend my foot back. The Achilles ligament is taut and the cap cuscles are firm and contracted. When walking, I walk on the ball of my foot; and I wear an especially heeled shoe to accommodate the position of my foot." X-ray examination: Comparison examination of both ankles shows no evidence of fracture or dislocation——

Mr. Angland: Are you going into your examination now? You have finished your history, have you?

A. That is the history, sir.

Mr. Angland: Yes. [257]

A. This is the physical examination: X-ray ex-

(Testimony of C. H. Horst.)

amination, right and left ankles, comparison examination both ankles show no evidence of fracture or dislocation. Bones of left ankle and foot show a diffuse, irregular type of demineralization. This type of change is seen in several conditions, namely, disuse, atrophy——

Mr. Angland: Just a minute, that is the roentgenologist's report. I will ask that the doctor tell us about the examination.

The Court: Is this report from the roentgenologist?

A. That is the report from the roentgenologist.

The Court: We just want your examination.

A. All right, sir. Physical examination, well-nourished white man; age 36; height, six feet, one-quarter inch; weight, 181; color, good; eyes, blue; tongue, moist, red; smooth shaven; walks with slight limp of left leg; cerebation, good; chest, well developed, normal in size; heart——

Mr. Angland: Just a minute, I think the doctor now, rather than giving his examination, is giving his conclusions when he tells us the condition of the heart. I think the question, your Honor, was what did he examine, what did he do, not the result of his examinations, your Honor.

The Court: Yes, I think that is so. You are telling us his heart is good. That is your conclusion as a result of your [258] examination. What you have to first tell us is did you examine his heart, how did you examine it, what examination did you make. We have to get that first.

(Testimony of C. H. Horst.)

A. I examined his heart. I will tell you what I did. I had him take off his shirt—he was disrobed for this examination anyway, so I took my stethoscope in my hand and looked at the chest and looked to see where his point of maximum impulse of his heart was, so I put my stethoscope on there and I listened, and the sounds were clear at the apex and base; there were no murmurs in his heart; it was a normal heart; then I took him by the wrist and put my hand around his wrist——

Mr. Angland: I am going to ask the Court to direct the doctor to respond to the question by the counsel for the plaintiff. The doctor insists upon giving us what he found; he wants to give us conclusions as he goes through as to what he found. As to whether or not his conclusions are going to be admissible is quite important in this case. We are perfectly willing to have the doctor testify to the fact he gave him a physical examination, and if the doctor or his counsel want to detail about the examination, fine, but I think the witness should be instructed not to give the results of that examination until proper questions are propounded to him.

The Court: Yes, I think you had better proceed on a question and answer basis so we can confine the testimony so that [259] counsel has an opportunity to make objections as they arise.

Mr. Doepker: Well, we will proceed then. You were relating at the time of the objection what you did towards making an examination of the patient's

(Testimony of C. H. Horst.)

heart. Have you completed saying what you did, Doctor, in the examination without giving your conclusions?

The Court: Have you told us everything you did in your examination of the heart?

A. His heart was normal.

The Court: No, we don't want your conclusion, Doctor, we want you to tell us everything you did in examining his heart, that is all. You have told us you put the stethoscope on him, is that right?

A. Yes, I listened to the sounds.

Q. (By Mr. Doepker): Did you make any further examination of the chest, and what examination did you make? A. I examined his lungs.

Q. And how did you go about examining his lungs?

A. Well, I first of all watched his breathing, then I percussed his chest; then I took the stethoscope and listened to the breath sounds.

Q. That is what you did in that examination, is that right? A. Yes, sir.

Q. Then, did you do anything else with regard to his pulse, did you take his pulse, or make an examination of his pulse? [260]

A. Yes, I took his pulse; I palpated his pulse at the wrist and took my watch out and counted the number of pulsations.

Q. All right, and then did you make any examination of the arterial walls that was subject to your examination? A. Yes, sir.

Q. What did you do to that?

(Testimony of C. H. Horst.)

A. I felt the pulse to be sure I had the artery, then I rolled it under my fingertips to determine whether it was soft or hard.

Q. Then, did you make any count of the pulse beats or not? A. Yes, sir.

Q. Did you take his blood pressure?

A. Yes, sir.

Q. Did you make any examination of his abdomen? A. Yes, sir.

Q. What examination did you make, Doctor, without stating your conclusions?

A. Well, I inspected the abdomen, and then I—I can't tell that—then I looked at his abdomen, and I put my hand on it and I felt nothing.

Q. Did you feel for any masses, or feel for the liver or the spleen? A. Yes, sir.

Q. Did you make any further examination of him at that time? [261] A. Yes, sir.

Q. What was that?

A. Then, you see, I was only half through the examination. I'll just see where I was.

Q. At the end of the examination of the abdomen. A. Then I examined the genitals.

Q. What did you do towards examining the urine?

A. I examined the urine; I took the gravity of the urine and I tested it for albumin and sugar.

Q. Then what further examination did you make of the abdomen?

A. There wasn't anything else to it, it was normal.

(Testimony of C. H. Horst.)

Q. I see, okay. Then what further examination of Mr. Hennessey did you make?

A. I examined his reflexes.

Q. To do that, what did you do? Just tell us what you did, not what the result was.

A. I looked at his eyes, and I looked at his pupils, and I had him close his eyes, and I looked at his pupils, and I had him open his eyes and looked at the pupils, and I pinched him on the side of the neck and I watched his pupils; then I had him look at my right eye with his right eye, and I had him hold his hand over his left eye and his eye closed, and I took a pencil to over the top of his head like that (indicating), and I told him to say "Now" when you see this pencil up here, left, right, left, right; and then I had him cross his legs and I hit him with a hammer on his tendon of his knee; then [262] I had him close his eyes and look at the ceiling, and I watched him; then I had him close his eyes and take his finger and see if he could touch the end of his nose like I am doing now; then, let's see what I did, some more, and then I examined his glands; I felt for glands in his neck, in his axilla, and I felt for glands in his groin, and then I examined his sensory mechanism. I took a pin and I stuck it around on his legs, and I took a test tube that had very hot water in it, and I took a test tube that had very cold water in it and tested him and asked which was hot and cold, and I took a stick that had a little wad of cotton on it, and I

(Testimony of C. H. Horst.)

traced that over his legs; then the next thing I did, I measured his legs, and then, before I measured them, I inspected them, I looked at them, then I measured them, and then I looked especially to see if he had—then I looked at his legs for swollen veins, I inspected the legs for veins, and then I pushed in with my thumb on the calf of his legs, and then I pushed in on the soles of his feet, and I examined his urine and, and I took and looked at his face, and I pulled his eyelids down to see what color they were, and I had him put his tongue out to see what that looked like, and then I made a resume of this case that you don't want to hear, and then I came up against the trouble that he was suffering from, and then I finally came to that.

Q. Now, then, Doctor, from this examination, including your [263] study of the Defendant's Exhibits that I have called to your attention, did you have any findings, first, with respect to your present physical examination that you were making at that time? You may answer that question yes or no.

A. Will you please read the question once more?

(Question read back by Reporter.)

A. Yes, I had findings.

Q. Now, I want to call your attention to the examination that you made at that time of the man himself. I believe I have a copy of your report, and will you state what the result was of your physical examination of him at that time?

Mr. Angland: I take it that question means, as

(Testimony of C. H. Horst.)

to what his condition was, means right then, on January 10th, 1953?

Mr. Doepker: That's right. I am now asking for your conclusion.

The Court: Your conclusion, as a result of all this examination you have made, what was his then physical condition, what did you find as a result of that physical examination?

A. I found that he was lame in his left leg, that he was walking on his toes.

Q. Can you refer to your notes, please; in regard to the physical examination, you have given us what you have done and I now ask you for your conclusions, starting out with the physical examination at the head and the chest?

A. My conclusions are that this man—— [264]

Mr. Angland: We don't want your conclusions as to what occurred, as to why he was in that condition. This is just what his condition was on January 10th, 1953.

A. Well, he was able to come to the office, and he had a lame leg, which was very painful, and the examination showed that the calves of his legs were painful.

Q. (By Mr. Doepker): May I ask and direct your attention to what you discovered upon that examination with respect to his chest, what your findings were at that time?

A. Well, his chest was normal, the lungs were normal, the breath sounds were clear, there were no

(Testimony of C. H. Horst.)

rales, noises in the chest, there were no friction rubs, both right and left lungs were normal.

Q. What did you find with respect to the heart, what was your findings with respect to the heart?

A. The heart was normal in size, the point of maximum impulse was in the fifth left interspace. It was in the clavicular line. The sounds at apex and base were normal.

Q. What did you find with respect to the pulse?

A. The pulse was regular. It beat 72 times per minute; the artery walls were soft.

Q. What did you find with respect to blood pressure?

A. Blood pressure was normal—pardon me, just a minute—the blood pressure was 120 high and 80 low. Both arms were tried, 120 high and 80 low. [265]

Q. What do you say with respect to the breath sounds?

A. The breath sounds are sounds you hear when you examine the lungs, and I just told you they were clear.

Q. I am sorry, I didn't hear that. What was your findings on that occasion with respect to the abdomen?

A. The abdomen, it was apparently normal. On the right side there were very long, half curved, linear scars on the anterior surface and in the groin; the left side scars were the same, but not so many; and I palpated the abdomen, and I did not find the edge of the liver; I percussed the chest

(Testimony of C. H. Horst.)

above to determine the height of it in the chest, and that was opposite the 4th rib; I felt for his spleen, and it wasn't palpable; I felt for his kidneys and they were not palpable, so I didn't get any satisfaction out of the abdomen, it was normal.

Q. What have you to say with respect to the examination of the urine?

A. The urine was of light ground color, and it had a specific gravity of 1.024 and reaction alkaline; no albumin, no sugar.

Q. And what did you find with respect to the neck? What do you mean by adenopathy?

A. That means if there is any enlargements of the glands of the body; so I felt for his neck, there were no glands; I felt in the axilla, there were no glands; and I felt in the groin, and he had none, so he had no adenopathy. [266]

Q. What was the result of your examination that you detailed with respect to the eyes?

A. The eyes were blue, the pupils were round, they were equal in size, they reacted normally to light and accommodation. His visual field was normal.

Q. All right, what about the neurological examination you have testified to?

A. The knee jerks, left, were very responsive and very active, and graded on a rule of four pluses, four plus being the maximum amount of reaction you could get from any jerk test, it was three plus. Now, that is very important. Now, the right knee

(Testimony of C. H. Horst.)

jerk was moderately active, it was two plus. There was no clonus.

Q. Explain what that is, Doctor.

A. You take the patient is supine—he doesn't need to be, but he can be as I am sitting; then you push up on the sole of the foot, give it a quick jerk, and if it is present, it responds by frequent contractions. He had no clonus. Now, the plantar-flex, the left sole of the foot was very sensitive. I had to try and try again before I got a reaction because he jerked it away. Finally I got it. His foot jerked convulsively at one time. It was completely involuntary for a few seconds. The final result was that there was normal plantar reflex, the right was normal and active, and the Achilles reflexes [267] were inactive.

Q. All right. What was the result of your examination with respect to disturbance of sensation, and this examination with respect to pain, heat and cold, and so on.

A. Well, now, I tried, first, I took a pin—I told you this once before.

Q. No; I am asking the result of it.

A. His sensory was—there was no sensory disturbance.

Q. What about deep pressure on the middle calves of the leg behind?

A. They were very painful, both of them.

Q. Did you find any rigid or hardened areas with the skin over the femoral, popliteal, and tibial blood vessels?

(Testimony of C. H. Horst.)

Mr. Angland: Just a minute, before he answers. I don't know what your Honor's position is, but I am sure I don't know what vessels he is talking about.

The Court: That is his problem. If I don't understand it, it is his tough luck.

A. You ought to know what we are feeling for; we are feeling for the condition of the peripheral blood vessels. We have to designate them. Just because you don't know the names—I don't have a map here.

Mr. Doepker: We have a bodyscope here.

The Court: It will be quicker; I can follow him.

A. There was no change or rigid indurated—indurated means [268] hard places—felt when the skin over the femoral—that is the artery that extends here from the groin to the knee, that is the femoral artery. I couldn't feel that. I got the pulse up here (indicating). The artery wall was normal. The popliteal is the artery—you feel for the popliteal space, that is behind the knee, and then——

Q. Tell us where that runs, Doctor, where you can palpate it?

A. Well, it is the lower end of the femoral artery, and then it goes into the tibial artery in the leg, which is a very important artery to feel, which will come up in this case, which is this artery on the back of the foot, the dorsalis pedis artery. I felt it and it pulsated, and it was normal, and there was no thickening of the artery; there were no thicken-

(Testimony of C. H. Horst.)

ing of any arteries to indicate he had an arteriosclerotic condition.

Q. Give us the result of your inspection of the left and right leg?

A. On inspection the left leg was definitely smaller than the right one. The measurements were not especially remarkable. The right leg circumference, seven and a half inches above the middle of the kneecap was 21 inches, and the left leg circumference also seven and a half inches above the middle of the patella was $20\frac{1}{2}$ inches, a difference in circumference of one-half inch. The right calf circumference, 12 inches up [269] from the internal malleolus, was $15\frac{1}{2}$ inches, and the left calf circumference, 12 inches up from the internal malleolus, was $14\frac{1}{4}$ inches.

Q. Doctor, is that internal malleolus, is that a portion of the foot?

A. It is a portion of the bone, a portion of the ankle bone. It is this nob here (indicating) that I have my finger on.

Q. What did you discover with respect to the veins?

A. No swollen, or unusually swollen or dilated veins present in either leg. A few veins were present just above the internal malleolus of the left leg. Deep pressure on the muscles of the legs, calves excepted, produced no remarkable tender areas.

Q. Now, Doctor, from this that you have related, and from your examination of the hospital chart of the Deaconess Hospital, and an examination of the

(Testimony of C. H. Horst.)

chart of St. Vincent's Hospital, and the examination of the chart of St. James Hospital, which are identified in this case as Defendant's Exhibit 2, Defendant's Exhibit 5, which is the St. James Hospital chart and record—

A. Pardon me, Mr. Doepker, will you tell me what the diagnosis was on those?

Q. No, I am going to ask you a preliminary question; I am going to ask you—read the question so far.

(Question read back by Reporter.) [270]

Q. —and Defendant's Exhibit 1, that is, the 1-A portion of Defendant's Exhibit 1, which is the chart of the St. Vincent's Hospital, and the record concerning the illness of November 29th, 1949, from that examination, and your examination that you have related, and the history of the case that you have related, will you say whether or not you are in a position to give your opinion concerning this case? You may answer that yes or no.

A. Well, of course, yes, but I am sorry that I can't identify them by just saying they were at St. Vincent's. May I have the histories? This one is laryngitis. That was on 11-29-49, I believe.

Q. That's right.

A. I understand that history. He had laryngitis and he was in the hospital a few days. This (indicating) is a terrible concussion.

Q. I am not asking you about that because it comes in subsequently.

(Testimony of C. H. Horst.)

A. I understand this one, this is——

Q. The one you have just identified is 1-B?

A. Yes, sir, and 1-C.

Q. And 1-C is alcoholic poisoning?

A. Yes, sir, I understand that, it is 1-C; yes, sir, I have reviewed those histories, and then further, I have related them in my history. [271]

Q. I now call your attention to the one which I have called the St. James Hospital record, Defendant's Exhibit 5, and ask you whether you are——

A. That is the chronic nephritis case?

Q. The chronic nephritis case, yes.

A. It says here it is echymosis, conjunctival echymosis.

Q. That is where he had his eye hurt in a hand-ball game. I am referring to the rest of it here.

A. Yes, sir. The rest of it isn't here, there is no history here. If that is the chronic nephritis, I know about it.

Q. There is no history here? I think I saw it?

A. It must be my fault, I saw it. This is the nephritis—I don't know—I wonder if it could be here.

Q. Well, at any rate, did you examine this record that is here of the St. James Hospital episode—here it is—beginning with the month of April, 1934, and continuing on through to October, 1934, starting with the pneumonia, and then winding up with nephritis?

A. This says, "Central pneumonia and gastri-

(Testimony of C. H. Horst.)

tis," and then here is one "enetritis"—I don't know how they all got mixed up, I am sorry. I am familiar with the enteritis, and with the trouble about the nephritis. The history, I am sorry, it is not there.

Mr. Angland: It should be there, it should be one of those files, it was here. [272]

The Court: Is there any evidence here that there was any history of nephritis?

Mr. Angland: I don't know. There was nephritis, the hospital record of that is all I know about.

Mr. Doecker: Here it is, your Honor.

A. This acute nephritis, I went over this history quite carefully. He entered on the 25th of June, 1934, and was dismissed on 10-20-34; yes, I knew that history, I examined it.

(Previous question read back by Reporter as follows: Q. Now, Doctor, from this that you have related, and from your examination of the hospital chart of the Deaconess Hospital, and an examination of the chart of St. Vincent's Hospital, and the examination of the chart of St. James Hospital, which are identified in this case as Defendant's Exhibit 2, Defendant's Exhibit 5, which is the St. James Hospital chart and record, and Defendant's Exhibit 1, that is, the 1-A portion of Defendants Exhibit 1, which is the chart of the St. Vincent's Hospital, and the record concerning the illness of November 29th, 1949, from that examination, and your examination that you

(Testimony of C. H. Horst.)

have related, and the history of the case that you have related, will you say whether or not you are in a position to give your opinion concerning this case? You may answer that yes or no.)

Mr. Angland: Just a minute, the form of question is objected to, your Honor. An opinion as to this case might mean an opinion that your Honor is going to be called upon to give in [273] the final analysis.

The Court: Yes, what opinion does it have reference to. You will have to change your question, Mr. Doepker. He may be in a position to give a lot of opinions, but some of the opinions may not be admissible or of concern to us. Direct it to a particular matter.

Q. By the question I further want it understood I am asking the doctor if he has, from the matters that have been referred to in this question and that are in evidence in this case in the way of exhibits and hospital records, plus his examination that he himself made, and the history which he has given, if he is in a position to give his opinion as to the cause of Mr. Hennessey's condition that is referred to in this case, and the matters that are referred to concerning his condition in the present case, your Honor.

Mr. Angland: Your Honor, I am going to object to any answer by the doctor along that line. The history he has given to the doctor is not the history of the plaintiff in this case as it has now been in-

(Testimony of C. H. Horst.)

troduced in evidence. Particularly I note that the doctor referred to an automobile accident. The doctor has not consulted with the doctor who was the same doctor who treated the plaintiff at the time of the return from Pocatello, Idaho. The treatment, according to the doctor who was in attendance, is the same, the history is the same.

The Court: Well, I think that all goes to what weight should [274] be given to his opinion.

Mr. Angland: I think it goes to the admissibility of the opinion. The history before the Court is a history different than the history the doctor——

The Court: He is not basing his opinion upon the history before the Court. He is basing his opinion upon the history he has recited that was given him. I will reserve ruling upon the objection and consider it further, if you think there is any merit to it, if there is any question.

Q. The question was, do you have an opinion? Do you remember the question?

A. Yes. Well, my opinion is that the man was treated for laryngitis and that he was treated for chronic nephritis, those histories show, and that he had some trouble with his nose. They don't seem to be material in this case. I didn't question it, so——

Q. Now, directing your particular attention to the condition that has been displayed by the chart from the Deaconess Hospital which you have stated you have studied, the time between the 3rd of January, 1950, and March 12th, 1950, and the condition of the plaintiff's body, as disclosed by that chart,

(Testimony of C. H. Horst.)

do you have an opinion as to what caused that condition? A. Yes.

Q. And can you explain it to the Court?

A. I will try to—— [275]

Mr. Angland: I don't think there is enough included in that question to make the answer admissible for any purpose, the answer of the doctor.

The Court: I didn't understand the question myself. Read the question again.

(Question read back by reporter.)

The Court: I don't understand what you are going at here.

Mr. Doepker: Your Honor, may I explain to the Court I am trying to direct his opinion now to the cause of this leg trouble that he had on the 7th of January, 1950.

The Court: Very well.

Mr. Doepker: And we were trying to take it in sections, rather than the entire matter.

The Court: I don't see how you can take it in sections. You have got an entire situation and you can ask it, but it has to be based upon that. That is the only opinion he can give. You can't do it in sections, it has to be as a result of the whole picture as he has it.

Mr. Angland: As I view it, unless it includes the whole picture, it has no probative value, and with the history as he has it, it has no probative value.

The Court: That may be so, Mr. Angland. Let's

(Testimony of C. H. Horst.)

get this in and you can argue it later. For the time being I will reserve ruling on your objection, and you can make argument on your objection later. Let's let the doctor give an answer and get through with this case sometime tonight. [276]

Q. Give us your conclusions on this case as now explained to you by his Honor.

A. The history referred to, on June 2nd, 1949, is that what you want?

Q. No, I want your analysis of the case, your opinion on this case, from what we have discussed here and the matters called to your attention.

The Court: You know, Mr. Doepker, just for your own benefit, I don't know that you can go ahead this way. I am not going to worry about it, it is your worry——

Mr. Angland: I want an objection to all of it.

The Court: It is understood it is all going in under objection, but you may find yourself in the position, after the case is all closed and the evidence is all in, that I can't even consider the evidence. You had better be sure that the testimony that you are eliciting, because it is going in under objection, you had better be sure it is admissible. You had better be sure the question you ask is one which the doctor, under the rules of evidence, is entitled to give evidence on; you had better be sure the proper foundation is there, because, as I say, Mr. Angland is objecting to all of this. It would be a terrible thing for me to look it over and say the proper foundation wasn't asked, the question wasn't

(Testimony of C. H. Horst.)

based upon the proper foundation, so that I couldn't even consider Dr. Horst's [277] opinion in the matter. I'll tell you what, I have just received some information that the case set before the jury tomorrow morning, or Monday morning, will probably not be tried, and I think it would be worth your while to prepare a proper set of questions to ask the doctor, laying the proper foundation and asking the proper question. Now, as I say, it is entirely up to you.

Mr. Doecker: Your Honor, I desire, then, if they are objecting that this history is at variance with the evidence in this case, it will be necessary for me to ask the doctor to assume facts that take us through all those exhibits, and I am willing to proceed and ask that question. That is the only way we can go if they take the position that the history is not in accordance with the evidence here, or if there is any material variation between the history the doctor has related and the evidence that is before the Court.

The Court: Well, I am not entirely clear that because the history he has related doesn't square with any other evidence here, that that necessarily excludes the testimony, but it just goes to the weight of it. If the doctor's history doesn't include some of the things that are actually in evidence, that will go to what weight should be given to his opinion in the light of that, but it is a matter for you to be concerned with. I don't care what question you ask, but the only thing it is being objected

(Testimony of C. H. Horst.)

to, and I want you to be sure, to be clear, [278] that you are on sound footing so that later you won't be washed out on some technicality. If you are satisfied, why, let's go ahead. Court will stand in recess until 4:30.

(Ten-minute recess.)

The Court: Very well, let's proceed with this.

Mr. Doepker: After deliberation and consideration, I want to renew the question which I have asked.

The Court: Which you have previously asked?

Mr. Doepker: And I want to add the further considerations to the doctor to this extent: that I want to ask him to assume that the facts, as he has related them in his history, were true; I want to further ask him to consider that the Defendant's Exhibit 1 was a record that was made in the regular course of the operation of the hospital at Billings, Montana, that is, 1-A, which is a record made prior to the Deaconess Hospital record 1-B and 1-C, which were made subsequent to them; I want you to consider that they were all made in the regular course of the operation of the hospital and have been testified to as correctly setting forth the record of Joseph P. Hennessey, the nurses' and doctor's, as they relate in that record; I want you to also consider that the Defendant's Exhibit 2 was a record of Joseph P. Hennessey, that it has been testified to, [279] and I want to assume that it is a fact that this record is kept in the regular course

(Testimony of C. H. Horst.)

of the operation of the hospital, the doctors, the laboratory, the X-ray and the temperature records, and the nurses' records were all made in the regular course of the administration of the hospital, as nearly as humanly possible are correct, and with respect to the defendant's Exhibit 5—has that been introduced in evidence, your Honor? I believe it has——

The Clerk: Five is in.

Mr. Doepker: All right—that the same is true with respect to this record of St. James Hospital, that is, here in Defendant's Exhibit 5; I want to assume those things as facts—we want to save the recitation of these entire records, it would take several hours—then, with respect to the automobile accident that was testified to that took place on the highway between Toston and Three Forks, Montana, that Mr. Hennessey—I want you to assume as a fact in addition that his right shoulder was injured, and that the doctor, Dr. Harry Soltero testified that there were no broken bones, nor no dislocations in that shoulder at that time; that he treated him for two or three days with diathermy; that subsequent to the 2nd of June, 1949, the same shoulder was injured in the fall of the man from the ceiling of the men's toilet at Pocatello, Idaho—I believe that you have that also in your history; I want you to assume that also is correct, and [280] that Mr. Hennessey was struck in the same shoulder at that time, in addition to the history that you have related, and considering those things and your

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own physical examination of the plaintiff, Mr. Hennessey, the history of his life as given to you, with his injuries and illnesses, and your study of these hospital records that are now in evidence in this case, I want to ask you upon that basis, are you in a position to give an opinion as to the cause of plaintiff's present physical condition?

A. Yes.

Q. Will you give us that opinion?

A. Well, I think Mr. Sullivan sustained——

Q. Do you mean Mr. Sullivan or Mr. Hennessey?

A. Mr. Joseph P. Hennessey, pardon me, has had a thrombus of his inferior vena cava, that he has suffered from emboli to his spinal cord causing anoxemia and thrombosis to some vessels in the spinal cord, resulting in disturbed spinal reflexes.

Q. What, in your opinion, do you believe is the cause of this condition?

A. I think it was caused by the man falling on him in the Pocatello Airport on the date specified here.

Q. The 2nd of June, you mean, 1949?

A. Yes.

Q. Now, will you explain to his Honor, your reasons for this opinion which you had? [281]

A. Yes, sir. Now, the crux of the question about this is: Where was this embolus started, was it on the—was it from the arterial side, or was it from the venous side? Ordinarily, all emboli, most of the emboli, do come down from the arterial side. This

(Testimony of C. H. Horst.)

is an unusual case, and the emboli, in my opinion, is here on the venous side, at the junction of the vena cava—the vena cava is this blue body (indicating on chart), and this is the aorta and the iliac arteries, and this is the vena cava to here, and these are iliac veins (indicating on chart). It is my opinion that this thrombus developed here at the junction of the two iliac veins of the vena cava. It formed right there, and that it formed as a result of this accident. Now, the history shows that the man first had a pain in his left leg when he got up out of bed, after he was told to get up, on January 7th, and the leg was struck numb, and then afterwards, when he went into the bathroom and came out and got a terrific pain, and the pain—then the pain developed in this right leg. Now, the question is, of course, how did the thrombus develop here? That thrombus is an intravascular affair which develops within the vessel itself, and, of course, there has to be something extraordinary happen to have the blood coagulate in the vein, because none of the blood in a normal individual does coagulate in a vein or artery; so in order to explain that, when this man fell and his body struck Mr. Hennessey on the shoulder, it hit him on his right shoulder, and he was [282] unprepared for it, and, of course, it caused a distension of all of these vessels, and, of course, the vessels can stand just so much pressure, and they will get a crack in the lining of it, which is called the intima, or they get multiple cracks in it, or it may be in this place, contusions,

(Testimony of C. H. Horst.)

because when the force of the body falling on Mr. Hennessey was transmitted through his body, it caused a congestion or distension of all of these vessels and veins. All right. So, if a vessel has a crack in it, or it has a multiple contusion in it, to cause the intima to split, from that wall in the intima comes a ferment. It is called thromboplastin. So, the moment that that crack or contusion develops, then the blood—certain elements of the blood go to seal that condition in the vein that is involved. Now, those blood elements that go to seal the injured vessel, the principal ones are plateleta thrombocytes and leukocytes, or thrombolysins and are sealed by the thromboplastin. So, that is the manner in which the thrombus developed, and that is how it happened to be here. Now, then, in my opinion, that is the way I have worked it out. Now, then, that is what they call a bland thrombus, and it sticks on the wall of the vessels. Now, in order to explain this thing, this blood goes up, and I say that the thrombus went down. Now, that is the difference. Now, if it went down, then that first part of it went here on the left iliac vein, and then afterwards a big portion of it went down on the other side. Now, may I [283] introduce just a little story from a history of a case that I have in the book?

The Court: Just explaining it, surely.

A. Now, in this book, which was written by Dr. Treves—he was a great English surgeon—and the book is called “Applied Anatomy,” and it was pub-

(Testimony of C. H. Horst.)

lished—there have been many editions of it, but this edition was, the first edition was gotten out September, 1883, and it has been and had frequent editions to it. Now, I am introducing this history because it will explain why that thrombus was on the vena cava, and why it split; and then there are from the history certain portions, I have taken from the history certain portions to explain it.

Mr. Angland: Is this just by way of explanation? Is this the history of a case that—Dr. Street, is it?

A. No, sir, his name is Dr. Treves, he relates this in this book.

Mr. Angland: He relates the history of a case that he encountered?

A. Yes, sir. This is the history: “As a young man, Dr. Pollock won the university 120-yard hurdle race in 16 seconds, making a record. He held breath throughout the race and collapsed when the tape was passed. Holding the breath dams the blood back in the great veins. The heart and pulsating muscles in such a race must force the blood onwards into the great venous trunks, with the result that the inferior vena cava [284] becomes over distended, damaged, perhaps thrombosed, and then finally occluded generally. The veins leading from the groin to the axilla at best become extended and varicose, and thus taking the place of the inferior vena cava. Now, the reason—throughout his life Mr. Pollock remained an invalid and had to wear elastic supports, the renal veins were also

(Testimony of C. H. Horst.)

occluded, but communication between the renal and subperitoneal veins opened up, the kidneys, however, never working as in health." Now, Mr. Hennessey had this body fall on him 120 pounds, from eight to 10 feet above him, and I conclude that these veins became terribly distended by the pressure of this man falling on his shoulder and back, and causing distension of both aorta—this is the aorta (indicating on chart)—and vena cava; and the aorta being a very strong, powerful vessel, as is also the vena cava, but of the two, the least to withstand this pressure would be the vena cava, and I think he had this force go down in this vena cava. I think the vena cava was completely full of blood at the time, and I think the pressure was so great that it interfered, causing a crack in the intima, it caused a general contusion of the lining of the lower portion of the vena cava, including a portion of the upper portion of each of the iliac veins, so, when these plateleta thrombocytes went from the blood to seal that injury, it built up these lymphocytes and leukocytes that gradually built up until he had a thrombus that occupied the bifurcation of this vena cava, and [285] some of the clot went in the left iliac vein, and some in the right, and when that boy got out of bed, those clots broke, and that explains why he had a thrombus, why he had this subsequent trouble in his leg.

Now, let's see, if he had a thrombosis on the arterial side, it couldn't get into these veins, because as these vessels go down and then divide and

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subdivide (indicating on chart), and finally get into little plexuses or capillaries, a big thrombus couldn't get through; so, therefore, if you want to figure out how he had a venous thrombus on this side—a venous thrombus in the vena cava could not come down from the arterial circulation. It couldn't be explained and neither could I explain the formation of the clot on the venous side unless I knew about the pathology there.

So, my opinion is that the man had an injury to his vena cava caused by the man who fell on him; that nature tried to cure it by piling up the proper cells that went to seal it; when Mr. Hennessey went to the hospital, he didn't know about the clot—how could he know, he couldn't feel it, he couldn't know he had it. The only thing he knew he felt this pain in his groin when he got out of bed, first on the left and then on the right, and so the only consequence was he had to have a doctor and he had collapsed, he had shock, and they put him in bed, and they found out his leg was swollen, certain portions of it were white, certain portions they couldn't feel the pulse. [286] They felt for that dorsalis pedis artery I told you about. They couldn't find the pulse there; they couldn't find the pulse in the popliteal artery—that I got from the history. They concluded it was an embolus that arose from the arterial side, but they didn't know—where do emboli arise on the arterial side? They come from the heart, they come from the heart, and that heart has to have a disease. Those thrombo-

(Testimony of C. H. Horst.)

cytes and leukocytes that I told you about form on the valves of the heart if they are diseased, they will deposit on there. We call the condition endocarditis, and sometimes those little deposits become very big and very fragile, and then they liberate when the heart beats, they are drawn off the attachment to the heart valves and distributed in the body, and some of them, when they go down here (indicating on chart), they come into the kidney, or into the spleen, or they might go into the legs.

So, then what else could the thrombi come from? They could come from—excepting it was the aorta that was injured, that is a very rapid flow of blood in the aorta, and if the vessels in the aorta crack, you could likewise get a deposit of thrombocytes or platelets and leukocytes. They could form there, but you see, the blood flows there so quickly, it would be wiped off and become an embolus. Sometimes if it sticks on there, it organizes and forms walls of tissue, connective tissue. Cells grow in there and establish it. It is a heavy layer. If [287] an embolus gets loose in the arterial system, it either goes down or up to the brain.

Now, then, what else could there be? I'll tell you now about the surgeons, the fellows that operate on you. Now, they operate on the pelvis, and they take out an ovary, or possibly a tube, or something. In about the 7th or 8th day, why the patient dies. What happened there, what happened? Why, these vessels in the pelvis become thrombosed the trombi got into the circulation, went right up, came up in

(Testimony of C. H. Horst.)

here (indicating on chart), to the right auricle, right ventricle, got pumped up into the lungs, and got stuck in the lungs. If that happens—of course, it would depend upon the size of the embolus, if it was very big, supposing this embolus—supposing instead of what I said—had gone up instead of going down, had gone up through this vessel—you see, here is what we call the pulmonary artery (indicating on chart)—it is made blue, but it is an artery—the blood gets aerated here, then the blood goes up through this pulmonary artery into the lungs to become aerated, then it returns, the blood does, back into the left auricle, then the left ventricle, then it gets pumped around the body. When an embolus gets into the lung by way of the pulmonary artery the embolus can't go any further because the terminae vessels won't allow it, because they are capillaries. If it gets stuck in there, pneumonia develops. If it is a big one, which this one was, it would have laid up in this pulmonary artery, and we wouldn't have this case, this fellow would be dead, because it [288] is too big. How do I determine that? By the history. How do I determine that the thrombus was in that position, that it could occur in the vena cava? By the history. This man here—it can occur—I'll tell you what they do now. Surgeons take and they put a string around this vena cava and tie it right off. It is quite a daring thing, I think; but, you see, where does the blood go if they tie it off? It has to go through collateral vessels. Some of these vessels go through, and are continued up into the

(Testimony of C. H. Horst.)

chest (indicating on chart). Your vessels, they are very superficial, they are in the walls of the abdomen; and yet others will go around the veins, the azygos veins—they are veins that go alongside the vena cava and make that communication; then there are veins within the vertebral column itself that conduct blood up, and astonishing as it may seem, they do just exactly as what this man said. Dr. Pollock lived a long time, but he was incapacitated, but the collateral circulation was established.

Now, that is my idea of this. Now, you can't explain, nobody can tell where the thrombus came from when they only think in terms of the arterial system, because it don't work that way. You can't explain it, but you do know this, that he did have a thrombus——

Mr. Angland: Is this your testimony——

The Court: You are not cross-examining.

Mr. Angland: Read the last of that, Mr. Parker.

(Last portion of answer read by [289] reporter.)

A. So, he did have a thrombus, and so his leg was injured in it, and now he has pain in that leg. May I read this complaint?

The Court: I don't think it is necessary now.

A. So then Mr. Hennessey has a pain in his leg all the time. Now, then, I think I have explained to you my idea of why that thrombus formed in this way. I have told you it was a bland thrombus; I told you in my opinion it had formed slowly for

(Testimony of C. H. Horst.)

7 months, and I told you I thought that when Mr. Hennessey got up to wash the pressure of standing erect came down, that the formed thrombus loosened and split at the bifurcation of the vena cava and that part of it went down into each leg or iliac veins.

Now, then, I will tell you about the foot. The foot is very difficult to explain because it is paining all the time, and still he has got the interference with circulation, so, I think a portion of this thrombus is gone in the leg, and that he has a collateral circulation in there now, and this circulation is better, and Mr. Hennessey, I think, is getting along wonderfully well. There is just this about it. You would say, how could the blood get through if both iliac veins were blocked with the thrombus, and in answer to that I will say that as soon as the patient was found to be in the critical condition that he was, they immediately gave him heperin and dicumarol, which I pick those out as the most important drugs, and they worked on this thrombus with remarkable results, [290] because the right leg cleared up very quickly, whereas the left didn't, but I think that that is why the man is living today, that they used those anti-coagulants to free the passage. I think that the cord—now, is it fair to ask any questions——

Mr. Angland: It will be in a minute, Doctor.

Mr. Doepker: No, give your explanation.

A. I want to talk about the trouble to the spinal cord, and I think he has—I think what happened——

(Testimony of C. H. Horst.)

Mr. Angland: I don't think there is anything in the complaint in this case about injury to the spinal cord, is there?

A. He certainly has a bad foot.

Q. You are giving your opinion about the condition of his foot, is that it? A. Yes, sir.

Q. Proceed, give your explanation of that, please.

The Court: Yes, proceed.

A. Now, when I saw the foot first, it seemed to me, your Honor, that the foot was, that probably the patient had, instead of bronchial pneumonia when he entered the hospital, he was getting over an acute attack of poliomyelitis because he had paralysis of certain muscles and his foot flexed down, and there was a difference in the measurements of the leg, and then the history showed that the temperature came down, but I have changed my mind on that. The results of anterior poliomyelitis, and the condition of thrombus that I am going to explain, the [291] results from either one would be just about the same, but when one is making a diagnosis, he should keep on with the original contention and employ that in his diagnosis, rather than introduce two different diseases. So, from this aorta (indicating), there are little veins that go out into the—they are represented here, I didn't see it at first, they are represented here (indicating on chart), and they bring the blood from the arteries, the arteries go in and then the veins come out and join and empty into the vena cava.

(Testimony of C. H. Horst.)

They go out, for instance, from the aorta, there is the aorta (indicating on chart), it goes out into the spinal cord, and then the veins come back, and they empty into the vena cava. Now, this clot, this thrombus, was right here on the lower end of his vena cava, and, therefore, when it moved down, it cut off some of those little thrombosed veins there (indicating), and it caused emboli from the thrombus to go back and lodge gray matter of the spinal cord. That interfered with certain pyramidal nerves that control the lower nerves, the lower motor neurons—it cut the lower motor neurons off from the upper motor neurons which control the lower motor neurons. Therefore, when the reflexes were tried, they were excessive, they had no inhibition from the brain via the pyramidal tracts and so the consequence was that when I tapped him on the left quadriceps ligament, it was very active, and then further it explained why that leg went into real convulsions [292] after when I was examining him once for a few seconds. His leg just contracted and relaxed time after time, and then finally settled down. Then the history shows that when Mr. Hennessey was in the hospital, his left leg would go into these contractions and his right leg would shoot out against the foot board and I think the reason for that was that the small thrombi kept invading the spinal canal through these little veins that are even with and attached to the original thrombus in the lower portion of the vena cava. Now, that would explain the origin

(Testimony of C. H. Horst.)

of the embolis from the thrombus in the vena cava, and I read that history to show it and how that was explained, the doctors in Dr. Pollock's time did not know then so much about the coagulation of blood as we do know now. They didn't know how blood coagulated. They knew how it formed, but didn't know this: They didn't know why, for instance, the blood didn't coagulate in their blood vessels when they were well, and they didn't find it out. They added this to it: They suggested an anti-thrombus ferment to be present in the circulation, and that just enough of it was present to interfere with the mechanism of the coagulation of the blood so it would not coagulate in the veins, because they would be all run over with thrombi if it wasn't controlled. Years ago a man named Hunter, he was English too, dissected a vein out of an animal and tied both ends of the vein off before he cut it off, and then he showed he could keep that blood in that vein for several days and it didn't coagulate because he didn't have enough thromboplastin in there to make it coagulate; so what I have done, I have told you about the spinal cord. When those little emboli went into the spinal cord, [293] they didn't involve the whole cord, they only involved a certain portion of it, and they destroyed certain reflexes. That would explain Mr. Hennessey's activity of his legs. Then again, they destroyed some of the anterior horn cells that supply the muscles with tonic reflexes, because some

(Testimony of C. H. Horst.)

of his muscles are partially paralyzed. So, now, I have explained why he has a paralyzed leg, where the thrombus formed; I have shown you how, in my opinion, he didn't have poliomyelitis, but I have shown you how thrombotic dissemination could destroy that nervous tissue in the cord, so that is where I stand.

Q. All right. Doctor, let me now inquire about your opinion—what in your opinion has been the effect of the record of the use of alcohol as disclosed by the St. James Hospital charts 1-B upon this condition and upon the recovery of the condition—no, that is 1-C, it isn't 1-B, it is 1-C?

The Court: You are in a rather difficult position here, aren't you, Mr. Doepker? Can you impeach your own witness?

Mr. Doepker: No, I am not trying to impeach him, your Honor.

The Court: Dr. Stokoe——

Mr. Doepker: I just want to see what extent Dr. Horst feels the damage is. We feel there is some damage. I was trying to see if he could give us an estimate of the extent of its effect.

A. Now, did you ask me the question of [294] what——

Concerning the interference with his recovery brought about by the use of alcohol, what percentage is that? Have you got anyway of determining what interference with Mr. Hennessey's recovery the use of alcohol was?

Mr. Angland: Just a minute. I will have to ask

(Testimony of C. H. Horst.)

can you give some explanation to the doctor as to the extent of the excessive use of alcohol.

The Court: Yes, if you are going to get it right down to this case, you had better outline how much alcohol was used, the extent of the use of the alcohol, over what period of time, and so forth. I should think if it has any effect at all, it would depend upon the quantity used and the time over which it is used.

Mr. Doecker: I don't believe we can give it. We will withdraw the question.

Q. Do you believe the concussion which you have described, and which was diagnosed as a cerebral concussion on September 7th, 1951—in your examination have you found anything to lead you to believe that that is still present? A. No.

Q. What is that?

A. No, how could there be any sign?

Mr. Doecker: He has none? You may cross-examine. [295]

Cross-Examination

By Mr. Angland:

Q. Doctor, take that little story that you have there, don't you like that little story by the doctor? Just read the first part of that. I believe you said that the man was a hurdler or runner?

A. He was a runner.

Q. He was a runner. He ran down to the tape and fell over?

(Testimony of C. H. Horst.)

A. Yes, he ran down and fell over, that's right.

Q. And from that time on, he remained a cripple, is that it?

A. That's right.

Q. The thrombus developed immediately, didn't it, Doctor?

A. Yes, sir.

Q. Doctor, you have stated here that from the history given to you by Mr. Hennessey, you have determined that the cause was the man falling on him at the airport in Pocatello, Idaho?

A. Yes, sir.

Q. Doctor, how severe, if you know, were Mr. Hennessey's injuries out of the automobile accident?

A. How severe it was?

Q. What were his injuries in the automobile accident?

A. He had a contused right shoulder.

Q. Anything else?

A. No.

Q. To your knowledge? [296]

A. Not according to my history. That is the one—it was done, the injury to the right shoulder, it was done at the time when the automobile turned over and over.

Q. According to your history, Doctor, he injured the right shoulder in the automobile accident down by Toston?

A. That's right.

Q. The right shoulder was again injured in the airport at Pocatello?

A. That's right.

Q. The injuries, so far as your history is concerned, were similar, weren't they?

A. They were.

Q. The medical treatment—you were here when

(Testimony of C. H. Horst.)

Dr. Soltero testified—the treatment for the two, and the recovery seemed to be about the same?

A. I wasn't here, sir, but if he said it was about the same, it was. I mentioned when I discussed the shoulder that the shoulder injuries were very long lasting. Mr. Hennessey stated he was over it in six months. Usually it takes much longer than that because of the peculiar formation of the shoulder, but the shoulder was not concerned in this, it was simply the accessory injury he got when the man fell on him, but I don't associate it at all with the thrombus.

Q. Doctor, you have regard for the doctor who attends the patient immediately after the [297] injury?

A. I certainly have, I think he ought to know more about it than I do. I can't help it if he thinks it is on the right side and I think it is on the left, but you must consider he doesn't know it——

Q. You don't know it either, Doctor?

A. I know it because we do have a thrombus. Which side would you put it on? Put it on the arterial side where it can't get through, or put it on the venous side where it stays, where it stayed?

Q. Of course, I am not qualified as a physician and surgeon and don't pretend to be.

A. I am trying to get that over, why it was on the left side. I related this little history because it was very short and to the point. It shows it was on the left side because he held his breath after running.

(Testimony of C. H. Horst.)

Q. Doctor, that man fell over immediately, didn't he. A. Yes.

Q. Does that indicate to you that that story might have a material variation from the facts in this case, wherein Mr. Hennessey stated that the man fell from the ceiling on June 2nd, 1949, and we find no sign of any blood clot until January 7th, 1950, is that a material variation in those two stories?

A. No, because I figure this way: The doctor dropping, I brought that in for the purpose of showing how a thrombus could occur. It doesn't state how long it was before they discovered it was a thrombus of the vena cava. [298]

Q. Doctor——

A. Wait a minute, now. This man, when he fell on Mr. Hennessey, he didn't know that he had any thrombus, and he didn't have any symptoms of it, and he wasn't knocked out; and I explained it took many months for that thing to build up, and I showed how those cells kept building up on the thrombus where it originally started until it got to be a very big thing. Then when he went to the hospital seven months afterwards, and he went for that bronchopneumonia, which he was recovered from in a few days and the doctor told him he could get up, that had seven months to develop, and when that came down, Mr. Hennessey went out, he just lost consciousness. You can't build a thrombus overnight.

Q. Doctor, it has taken you quite a statement to

(Testimony of C. H. Horst.)

give an answer to my question. Is there a material feature to consider that would differentiate the story you have read and Mr. Hennessey's case, wherein the injury occurred several months prior to the time the blood clot showed up?

A. Yes, there would be this factor——

Q. Is that factor a material difference, Doctor?

A. Well—is that factor a material difference? The only significance of it is that when the man ran, he held his breath and developed a tremendous pressure in his arterial vessels, and they were so distended with blood that he afterwards developed this thrombus, whereas, Mr. Hennessey, he didn't know it, but when this man fell on him, he had a like increase of pressure in his vessels, because this thing was of lightning—it only took a few seconds to fall down, but if ever you have tried to lift a body that was 120 pounds in weight yourself, unless you were a trained man, you would find it was awfully heavy. They are the heaviest things I ever saw. When they fall, they fall with greater force than 120 pounds. That came down, it dilated all the lungs, the lungs came down, the diaphragm came down, the intestines came down. That contused the interior of this vessel and split it, but not in one place, but in many places.

Q. Doctor, the pressure came down. How long did that pressure last?

A. I wouldn't say but only a few seconds.

Q. Just a few seconds?

A. Yes.

(Testimony of C. H. Horst.)

Q. I suppose if it would cause the vena cava to expand with the pressure, could it have caused the aorta to expand too? A. Yes, sir.

Q. Then, the thrombus may have developed in the aorta, is that your opinion?

A. My opinion is just the reverse.

Q. May it have done it, is that a possibility?

A. Yes, that is a possibility, but I don't think it did in [300] this case, and I think if these two vessels, the aorta and the vena cava were both distended with blood and a big pressure put on them, the vena cava would be the one to contuse or split before the aorta. Why? Because it is a much stronger vessel than the vena cava. It is a strong muscle and has a great deal of elastic tissues in it. So has the vena cava, but the vena cava is the smaller one. I think it would give first.

Q. In the story you read, Doctor, the man hit the tape and he fell. Now, Mr. Hennessey had a pressure from the man falling, assuming he fell in the fashion you imagine—there is a conflict in the evidence here on that—assuming he fell with his full weight on the shoulders so he caused this caving condition you are talking about, that is when the expansion took place, isn't it? A. Yes.

The Court: Let me interrupt. Is this opinion you have given, Doctor, based upon the assumption that he fell, that when he fell, he hit upon Mr. Hennessey's shoulder straight, the 120 pound weight?

A. Yes.

The Court: By a direct blow?

(Testimony of C. H. Horst.)

A. Yes, sir.

The Court: And your opinion is based upon that? A. Yes, sir. [301]

The Court: I think it is obvious that the cross-examination is going to take some time, and as I have been advised we probably will not have to try a case before the jury Monday. Court will stand in recess until ten o'clock Monday morning. [302]

C. H. HORST

recalled as a witness on behalf of the plaintiff, having previously been sworn, testified as follows:

Cross-Examination

(Continued)

By Mr. Angland:

Q. Dr. Horst, when we suspended Saturday, I think I had inquired of you concerning the little story you had read from a book written by Dr.—

A. Treves.

Q. —Treves, yes. You referred in that story to a runner who had come up to the tape and dropped over. A. Yes.

Q. And was a cripple the rest of his life. Now, I inquired of you as to whether or not the fact that that runner dropped over immediately differentiates that example considerably from the situation with respect to Mr. Hennessey in this case, who did not develop the thrombus, or not the thrombus, the blood clot, until approximately seven months after

(Testimony of C. H. Horst.)

the alleged accident. Doesn't that make the two situations very different, Doctor? [306]

A. The situations are different. In Mr. Hennessey's case, the question that puzzles everybody that examined him, puzzled me, was the source of the embolus, and I introduced that story here, the history of that runner, to show how the embolus could arise in the inferior vena cava. The conditions were not parallel except that the runner exerted pressure on his vascular system when he ran, and he had in addition an accelerated pulse, which also raised his pressure in his vascular system.

Q. Couldn't he, as a matter of fact, have developed what you in the medical profession refer to as alkalosis?

A. I never considered alkalosis in my life. I presume it is alkalinity of the blood, but it doesn't concern me in this case.

Q. You don't think it might have been the situation in the case of the runner?

A. I haven't considered it. I was trying to explain to you, sir, in answer to your question, so when this man ran, he held his breath, when he ran, his heart beat fast, so he had a pressure on his vascular system, and after it was developed that he had a thrombus of his vena cava. Now, our man, Mr. Hennessey, he had a pressure on his vascular system, but it came from an external force, the man's body, for instance, falling on his body, and that caused an increased pressure in the veins; so, the principal reason that I introduced the [307]

(Testimony of C. H. Horst.)

history was that it is so very difficult to find in the medical journals just why or how a thrombus can form in the vena cava when the ordinary course for a thrombus is to occur in the heart, for instance.

Q. Yes.

A. You see, now, then, the pressure that came down on Mr. Hennessey from the body landing on him caused a pressure in the aorta and in the vena cava. Is that an answer to it?

Q. The runner, if he didn't develop alkalosis, developed, rather than a thrombus, he had a clot that formed immediately and caused damage immediately, isn't that right?

A. I told you I know nothing about alkalosis causing any thrombus. That is far fetched.

Q. I am not asking about alkalosis now, I am asking about an embolus, if it was an embolus?

A. Yes, sir.

Q. He suffered from that immediately before it became a thrombus?

A. The way that I understand—the reason again, I will say to you, that I introduced that special history for the reason to show you that the thrombus can form in the vena cava without originating in the arterial system. That was all that was introduced for. Now, then, I would like to go now and tell you how it happened here.

Q. Let's see if we can get on with this, Doctor. Maybe we [308] can get on with it this way: The embolus or blood clot, if it is formed by a blow of

(Testimony of C. H. Horst.)

any kind, immediately causes injury. If it doesn't immediately cause injury, it attaches itself to the vessel wall, is that right, and becomes a thrombus?

A. That's not quite right.

Q. Tell us how it is then?

A. I'll tell you what it is. Now, then, the injury occurs, and the blood vessel is injured, so what happens? The blood vessel has to split somewhere, it has to have an injury, so that the serum from the tissues has to exude, a thromboplastin, and this thromboplastin attracts to it the blood cells from the blood, and then they go over this rupture in the vena cava and seal it off, exactly as when you have an injury to your hand, you skin your hand. There is a fibrinous exudate, and the next thing, if the thing don't happen to get infected, you get a scab. That is the process you have to go through to form a thrombus in the vena cava. You can't have a thrombus in the vena cava develop in the blood itself. It first has to have some thromboplastin. If you didn't have thromboplastin in the blood, why the whole body would become consolidated in a clot.

Q. Doctor, you said that the pressure from above caused an expansion of the aorta and the vena cava?

A. Yes, sir.

Q. It is your theory that there was a cracking of the [309] internal walls—so that we will understand it, it amounts to a little cracking of the internal walls of the vena cava?

A. Yes, sir, that's right, only I would say it is impossible to determine whether it is a little crack

(Testimony of C. H. Horst.)

or multiple cracks, and then contusions of the interior of the wall of the vena cava. You see—that is the answer, isn't it?

Q. I think so, Doctor. Now, Doctor, these blood vessels, the aorta and the vena cava, are rather heavy walled, muscular blood vessels, aren't they?

A. They are, but there is quite a difference in them.

Q. Yes, the aorta is much heavier?

A. Yes.

Q. They are somewhat flexible?

A. The aorta is well supplied with elastic tissue and with muscles, and, therefore, it will stand considerable expansion. The vena cava, on the other hand, does not contain very much elastic, nor it does not contain very many muscular elements. It has a limited amount of expansion.

Q. You could even, I suppose, compare the two of them to a rubber hose, one being a heavier, more elastic hose than the other?

A. That's right, you could.

Q. Doctor, when you get the pressure you speak of on the aorta and vena cava, the smaller arteries and veins would break much more readily wouldn't they? [310]

A. Would they break? No, they wouldn't break, but if that came down, if the pressure, assuming that the pressure, that the man gets hit on the shoulder and down the pressure comes in the vena cava and aorta right away. You will notice that this left iliac vein (illustrating on chart)—the com-

(Testimony of C. H. Horst.)

mon iliac vein goes from the bifurcation of the vena cava. The left iliac, it goes to the left and then down, the right iliac vein goes obliquely down, more direct by far than the left does, so that is supposed, is classed by people who studied this, that that is obstructed from the pressure that comes down. I call your attention to this common right iliac artery that crosses the right common iliac vein. When that pressure came down, the pressure was increased both in the vena cava and the aorta. That aorta, being a very strong and powerful vessel, pressed in on the right common iliac vein. The vena cava, you see, bifurcates here into the right common iliac vein and the left common iliac vein. I showed you the left common iliac vein goes obliquely outwards, whereas the right common iliac vein goes straight down and out. Now, to get back to this artery, this right common iliac artery——

Q. Doctor, aren't we drifting along some distance from the question?

A. No, these are very important things to know.

Q. We are interested in knowing them, but right now we are interested in having you answer my question, and I think the [311] Court is. The arteries, the small arteries that lead from the aorta, and the veins that lead into the vena cava are more susceptible to damage than are the aorta and vena cava, is that right?

A. No.

Q. They have heavy muscles surrounding them?

A. Those little veins, they are very small, and

(Testimony of C. H. Horst.)

the pressure goes right by. It is like a little stream of water going into a big stream, the big stream carries it along. The pressure will naturally go along the largest vessels.

Q. It wouldn't force, as it came along the larger vessels, it wouldn't force the blood out into the smaller vessels and cause them to become damaged more readily than the large muscular vessels?

A. I don't think so, I think the pressure would follow the course of the larger vessels. I thought those little veins you speak of were involved at the time when Mr. Hennessey was in the hospital and got out of bed and he had these thrombi in the vena cava that began to slip, and if the assumption is right that there was a thrombus in the vena cava, then the little vessels, the little veins that go from the spinal cord and empty into the vena cava could be disturbed then, because if the clot slipped, it could cut them off; then that would cause in turn a stasis of blood in the spinal cord itself, and if that blood did not circulate, then there would [312] be what we would call an anoxemia; there wouldn't be enough oxygen supplying the nerve tissue, and they won't live long if they aren't supplied with oxygen, so, I figured while the clot was forming, those little veins emptied regularly and normally into the vena cava, and were not involved when the first pressure took place.

Q. The smaller veins were not involved on the first pressure? A. That's right.

Q. It was only the vena cava?

(Testimony of C. H. Horst.)

A. You will understand that following the injury, the only thing that occurred in this vena cava was just little cracks that we were talking about. It took seven months for that thing to develop.

Q. Yes, according to your theory, you had these little cracks in the internal wall of the vena cava that built up what you call a thrombus?

A. Yes, thrombus, that is a thrombus.

Q. Does that just build and become a little bunch or lump in there, or does it continue to build?

A. Well, sir, it continues to build. The first thing that happens in the formation of a clot is the crack in the intima, the lining of the blood vessel. When anything cracks, it usually bleeds. When cells bleed, they have thromboplastin, and then that attracts the platelets and white corpuscles to the place where it is cracked because it has this [313] enzyme thromboplastin, and those cells keep building up and building up, but you see, the point is that they don't take one place, but they take many places, because when that pressure came down, it had the obstruction to the vena cava I explained, and I think this vena cava ballooned somewhat because of the obstruction caused by the artery pinching the vena cava, the left iliac vein. You see, if the pulsation comes down, it pinches it there (indicating on chart), and that caused a backing up of blood in here. From the blood with those thrombocytes I explained the thrombus formed. One can't tell if there was one crack. If there was one crack, it would be as you figured it out, it would be on one

(Testimony of C. H. Horst.)

side, but it could be forming on all sides and progressing down into the vein on each side, and how could anybody tell really what was the nature of that thrombus.

Q. The difficulty is nobody can tell what did happen in this case, that is the difficulty, isn't it?

A. The only thing we know, and everybody concedes, it was a thrombus, and the man got out of bed and there was some slipping——

Q. And the embolus went down into the left leg?

A. Yes, and the reason it seems to follow so nicely according to my way of looking at it, the left leg was the one that gave the greatest obstruction, so the pressure caused probably considerable injury in this left common iliac vein, because [314] the left leg is involved most, and the right leg healed up so promptly with the administration of that heperin that he was relieved of that almost at once.

Q. Doctor, your theory is that the embolus flowed, so to speak, upstream?

A. Yes, that looked like an objection.

Q. Isn't that your theory?

A. It should flow upstream.

Q. Because the blood from the legs that comes into the vena cava is coming up?

A. You are quite right.

Q. But your position is that the embolus fell off here (indicating on chart), and went down into the left leg?

A. That's right.

Q. Against the stream so to speak?

(Testimony of C. H. Horst.)

A. That's right, and that brings up my story, that brings up what I tried to get over, that those emboli do form in the vena cava. They don't come from anywhere else except from the wall of the vena cava, and that took in this case seven months to build it up. It formed quite a clot in there. The history shows the clot couldn't go up, it was attached to the walls. Then, when he was in bed four days, it loosened up. That could have happened when he was going to his office that morning.

Q. Doctor, your theory is that there were multiple cracks, [315] so that we will understand it, in the wall of the vena cava?

A. That's right, in the intima.

Q. That built up a thrombus? A. Yes, sir.

Q. And to the extent that it completely filled in?

A. It might be almost complete.

Q. The vena cava?

A. Yes, sir, and the blood might have gone alongside there. It was a very heavy clot. When it got loosened, it had to go somewhere. It broke off and went right first and left secondly.

Q. When you speak of occlusion, you mean that the thrombus built up in there and shut off the flow of blood of the vena cava?

A. Yes, it was shutting it off each day.

Q. Of these seven months?

A. Yes, building up seven months. Of course, he didn't know when he had those little cracks in there. He had no sensation. He walked around and didn't even know what happened. If that thing had oc-

(Testimony of C. H. Horst.)

curred to him and nobody had fallen on him and he came home in the airplane and the clot would have slipped, he would have the same effect as now.

Q. It didn't happen then, so we don't know when the clot formed or where it formed?

A. All we know is this: There can be a clot form in the [316] vena cava.

Q. That is possible.

A. We have explained why it did. If it did. If it can form there as it did in this runner, why couldn't it form in Hennessey? If that is a fact, then when he has the clot formed, all at once it loosens up and strikes the right and left leg, paralyzes them. It shocked him. It was an awful shock. He didn't know where he was. He was all right. He was able to get up that morning. All at once it came on. He didn't get a shock when it started——

Q. Let's see if we can figure this out, Doctor. The theory that you have is that the thrombus began to form here (indicating on chart)?

A. Yes, sir.

Q. In a matter of seven months, wouldn't that thrombus be such that it would completely fill the vena cava—now, just a minute. Am I correct in this: If a thrombus begins forming on the wall of either the artery or the vena cava, it doesn't just grow and stay like a little ball here, does it? The cells keep building up until they completely block off the vessel, isn't that right?

A. That's right.

(Testimony of C. H. Horst.)

Q. Then you have your auxiliary vessels taking over?

A. The collateral vessels, yes, sir, collateral circulation will be established. [317]

Q. How long, in your opinion, Doctor, would it take for the vena cava to completely close off when you have a thrombus begun?

A. Well, how long? I can't tell you how long; it lasted here seven months.

Q. How long does it take to close it off?

A. You see, supposing—I will answer the question. I don't know how long. It depends on the individual, and it depends on the extent of the tears that occur in the intima of the blood vessel, and it depends upon the amount of thromboplastin thrown out in the vena cava, and the thromboplastin furnished by the platelets and corpuscles. If there was just a little scratch, for instance, and just a little thromboplastin was thrown out, these platelets would seal it up and the corpuscles would stick on and the thing could be absorbed, and nothing would happen to it, but if he had multiple contusions to his vena cava and multiple cracks in the intima, then there would be more thromboplastin and more leukocytes thrown out, and the thing would keep on building up. You know platelets build up thromboplastin, too, to help in sealing up the vena cava. That is the way the thing formed. That man ran around for seven months. He didn't know he had anything wrong. How could he know? It

(Testimony of C. H. Horst.)

didn't give him any sensation, it was in this big vein, and all at once it came off like that.

Q. Doctor, is it your opinion that the thrombus completely [318] filled the vena cava?

A. No, I don't think it completely filled it so the blood couldn't circulate. The man right away would have a dilation of the pelvic blood vessels. Blood couldn't get through, so it would back up.

Q. That is what we are getting at.

A. I was telling you. I am glad to arrive; now, we will get on.

Q. What I am getting at, Doctor, as the thrombus built up in the vena cava, you begin to shut off the flow of the blood upward through there?

A. That's right.

Q. And you start getting the pressure you are talking about to hold the blood back down, wouldn't you?

A. Yes, below the thrombus. It couldn't go up so well, so around here and here (indicating on chart), you have some collateral vessels that develop collateral circulation all this time. If the blood was all cut off by the thrombus, then the veins that the blood carries up through in the extremities in, it would be backed up and the veins would be enlarged.

Q. It begins to back up?

A. Down, this way (indicating on chart).

Q. I stand corrected. It begins to back down into the lower extremities?

A. That's right. [319]

(Testimony of C. H. Horst.)

Q. When it does that, you get some swelling?

A. Yes, you get swelling of everything. You get swelling of the tissues of the leg, and you get dilation of the veins, and you get enlargement of the arteries.

Q. It wouldn't be too long after the thrombus forms in the vena cava, it wouldn't be too long before swelling begins in the lower extremities?

A. That's right, something would happen.

Q. Have you examined the hospital chart for Mr. Hennessey in November, 1949? Did you find from that chart any swelling of the lower extremities?

A. November of?

Q. November of 1949. You may look at the exhibit. I think he was in the hospital with pneumonia at that time.

A. That is the beginning of this trouble when he had pneumonia.

Q. That's right. We want to find out about swelling in the lower extremities. You say that would happen.

A. I don't see anything in here about that. Show it to me.

Q. I am not very good with those charts.

A. You can't do any good with them, except the nurses' report and a rapid summary of the doctor. They don't go into the thrombus. They say it is a thrombus, but don't know where it arose from. That is all I get out of this history.

Q. I am confining this to November, 1949, when Mr. Hennessey was in the hospital by reason of an

(Testimony of C. H. Horst.)

infectious condition in his lungs and about his larynx.

A. November, 1949, "I had a severe attack of laryngitis. I couldn't talk, confined to St. Vincent's Hospital four days. I made complete recovery." That is my notes on it.

Q. Yes. Doctor, look, please, at Defendant's Exhibit 1, and particularly the portion thereof that is identified as 1-A, just the record of hospitalization in November, 1949, and do you find in that record when he was being hospitalized any record of a swelling of the lower extremities by reason of the forming of the thrombus in the vena cava that you have been talking about?

A. No, I don't, because I looked at this thing and I didn't see anything about it.

Q. You didn't find it there, Doctor?

A. "R. of abdomen pains." What does that mean?

Q. I don't know.

A. Nobody can read my writing, but I can't read theirs. I saw nothing in this history—I looked it over—to indicate there is any venous involvement whatsoever.

Q. That's right. You found nothing in the history to show that by reason of the thrombus developing in the vena cava that there was swelling in the lower extremities, did you? A. No.

Q. That tends to disprove the development of the thrombus in [321] the vena cava, doesn't it?

A. Why does it disprove it?

(Testimony of C. H. Horst.)

Q. If you had a thrombus developing in the vena cava, and as you shut off the flow of blood upward, you stated you would have a swelling in the lower extremities, isn't that right?

A. That's right, but in November, 1949, that thrombus was just beginning.

Q. Just beginning then? A. Yes.

Q. I thought it began in June of 1949?

A. It was November. That is when he had——

Q. That is when he had pneumonia.

A. The thrombus formed at the time the man fell on him.

Q. If you are talking about a thrombus here that developed in November, that has nothing to do with this accident?

A. Oh, forget that history. The accident in Pocatello was June 2nd. That is when the man fell on him. That is what I am trying to correlate the thrombus with. If what happened in November, if he had any swelling in November, that could be possible, but he didn't have any **bothering him in November** because I went through that carefully.

Q. You have gone through the hospital records and find no history of swelling of the lower extremities by reason of the development of a thrombus in the vena cava?

A. That's right, not any swelling of any leg.

Q. Then, Doctor, that does tend to show there was not in [322] fact a thrombus in the vena cava, doesn't it?

A. No, it hasn't taken long enough. It took seven

(Testimony of C. H. Horst.)

months for that to form. He got injured June 2nd, and he went in the hospital in November. The thrombus didn't develop until January 7th.

Q. It didn't develop——

A. It didn't say hello until January 7th. He had no trouble with his legs until January 7th.

Q. Doctor, I understood you to say it was developing from June 2nd, 1949.

A. You understood correctly, but it wasn't giving any symptoms. The man didn't know he had it. It wouldn't have had any relationship to this accident if it hadn't been for the man falling on him at that time.

The Court: It seems to me you are discussing two different things, both of you. What counsel wants to know is if there was a thrombus on the vena cava formed on June 2nd, 1949, why doesn't there appear in the hospital records that there was some dilation or swelling, why weren't there some symptoms in the leg in November, or early January, 1949, or 1950?

A. Because the thrombus was not developed completely to obstruct the vena cava.

Q. There wasn't even any swelling of the lower extremities upon entrance into the hospital January 3rd, 1950?

A. From the fact—I would like to have you tell me where was [323] the swelling in this history.

The Court: Doctor, you see you are the expert.

The Witness: Yes.

The Court: You are not to question counsel, you

(Testimony of C. H. Horst.)

are to answer his questions. Let's get along, and let's direct the answers to the questions, then if you have got an explanation, later Mr. Doepker can question you and get it cleared up. We have been here now 40 or 50 minutes and we haven't covered very much. Let's make a short answer to these questions wherever possible.

A. There could be a slight swelling in the leg, but it wouldn't be due to a thrombus in the vein.

Q. Did you find in the hospital record of November, 1949, any swelling of the lower extremities by reason of the fact of what you say is true, the thrombus developing in the vena cava would cause a swelling. Was there any swelling in the lower extremities in November, 1949?

A. I don't know.

Q. Did you look over the record?

A. I looked over the record; I didn't see it. It didn't strike me if it is there.

Q. You have said that a thrombus developing in the vena cava does cause swelling in the lower extremities?

A. That is true, it certainly does. [324]

Q. Four days before the embolus showed up, January 3rd, 1950, Mr. Hennessey was admitted to the hospital, that is, on January 3rd, 1950. Did you find any notations in any of the hospital records to show that there was swelling of the lower extremities at that time? A. No.

Q. There is no record of that? A. No.

(Testimony of C. H. Horst.)

Q. As a matter of fact, the first you find is on January 7th, when the embolus broke loose?

A. Yes, sir.

Q. And you say the embolus, so to speak, flowed upstream to the lower extremity, the left leg?

A. Yes, sir, I explained it much more in detail than that.

Q. In any event, that is what happened? The normal flow of blood in the vena cava is upward into the heart?

A. It is.

Q. It doesn't carry downward?

A. That's right.

Q. The aorta carries blood downward?

A. That's right.

The Court: Does an embolus ordinarily follow the blood stream, or does it ordinarily go against the blood stream?

A. It depends where it comes from. If it is detached, for instance, from the heart valves, it flows with the blood that [325] would be the arterial side. It flows downwards. If the thrombus appears in the venous side, it is difficult to explain it because the blood flows up in the venous side, it doesn't flow down, but Hennessey's, when it formed, it was very heavy, very heavy. It involved the whole lower vena cava to some extent, that is, the right and left iliac veins, and the thrombus after seven months was heavy and was attached to the walls. When he was in the hospital, it loosened, and being heavy, it gravitated down and choked the veins off.

(Testimony of C. H. Horst.)

Q. Doctor, it doesn't drop like a marble would, does it?

A. No, sir, if it were a little thrombus, it could be carried up and would lodge in the lungs.

Q. Ordinarily it would be carried with the blood stream?

A. But the point is, how does the embolus get in there?

Q. Let's stay with this question. An embolus ordinarily follows or will follow the course of the flow of the blood?

A. That's right.

Q. That is the situation? You don't get an embolus that just drops through the blood vessel like a marble?

A. Not unless you had the arterial side. Supposing it was a thrombus on the valve of the heart and it was on the aortic valve. When the heart beats, it sweeps that off. It would go down in the arterial side, it goes down.

Q. Doctor, a thrombus, as a matter of fact, consists of a good deal of scar tissue, doesn't it? It attaches and becomes [326] just a part of the wall of the blood vessel?

A. That is on the assumption that the thrombus was formed including red blood corpuscles and these platelets and puss cells I described, but the thrombus on the venous side is called a bland thrombus and is not so highly organized as a thrombus would be growing on the heart valve for months. It is a swifter thrombus, and that is why—that is the difficulty in this case, trying to find out where the

(Testimony of C. H. Horst.)

thrombus formed.

Q. Yes.

A. The thrombus formed because of the pressure that was exerted on his entire system when he was hit on the shoulder and back, and in forcing that down, it had these obstructions I described. Little thrombi developed, and as they grew, they grew to a considerable size after nine months and begin slipping.

Q. What are the hard or swollen substances in the abdomen that would crush against the vena cava to cause this cracking, as you call it, or tearing? Is there anything in there?

A. This is all: When this artery (indicating on chart) full of blood came down, it crushed this left iliac vein and it obstructed the blood that was also forced down on the vena cava side, and, therefore, it did and could injure the intima of the vena cava and iliac veins.

Q. It is possible, isn't it, Doctor?

A. It is the likeliest thing in this case. There is nothing [327] else in this case to form that thrombus.

Q. You are in complete disagreement with the analysis of your brother doctor?

A. Please don't tell me——

Q. You heard the other doctor testify?

A. All I could get out of it was he couldn't give you the source of the embolus.

Q. He didn't know.

A. Yes, but I am trying to establish it here.

Q. He consulted with some 40 doctors——

(Testimony of C. H. Horst.)

Mr. Doepker: We object——

The Court: Sustained. It is not a question for Dr. Horst to explain some other doctor's knowledge or lack of knowledge.

Q. Doctor, as the thrombus developed in the vena cava, I think you said there were collateral or ancillary veins that take over? A. Yes, sir.

Q. Did that happen in Mr. Hennessey's case?

A. Well, it didn't show on the surface of the body.

Q. Wouldn't it show on the surface of the body if the collateral veins take over from the vena cava? Doesn't it show on the surface of the abdomen?

A. It does if it continues long enough. If this thrombus had organized the way you had in mind in your question, and it had organized, that is to say that cells had grown into [328] the thrombus and it had attached itself firmly, this collateral circulation would have been established; but I dare say that it was in the process of formation, but the veins hadn't become distended enough, or the collateral circulation hadn't been established enough to see it on the surface of the body. The collateral circulation consists of veins that not only extend through the walls of the abdomen, but they likewise develop on these azygoes veins that go alongside the vena cava, and they also drain through the spinal cord.

Q. Dr. Horst, if the vena cava has a thrombus that has caused an occlusion, a shutting off through there, wouldn't the collateral veins show on the

(Testimony of C. H. Horst.)

abdomen, wouldn't they be apparent to the naked eye?

A. Not unless the occlusion was complete as it was in that runner, but the blood was certainly circulating alongside of that thrombus in the vena cava right up to the time the man had that accident happen. It was going on the side of it, it wasn't a complete occlusion. The blood was circulating in there, else he would have had just the thing you are talking about.

Q. What percentage, in your opinion, of the vena cava was shut off by reason of this thrombus?

A. Well, I am of the opinion that it was shut off about—it wasn't shut off, it was partially obstructed from the bifurcation, it might be, up to about three or four inches. [329]

Q. Three or four inches?

A. I would expect it there if I was to do an autopsy on him; I would look for it there.

Q. What percentage of the flow of the blood through the vena cava was cut off by reason of that?

A. I think it all got through.

Q. It all got through? A. Yes.

Q. You wouldn't have any using then of the——

A. Complete obstruction, no.

Q. You can't, then, believe that you used the collateral veins at all?

A. It will have to develop. I dare say there was moderate obstruction, but there was no obstruction to develop these collateral veins. You can see them in bodies that have that, but they weren't there. I

(Testimony of C. H. Horst.)

couldn't say it wouldn't happen in some bodies, but it wasn't in Mr. Hennessey's.

Q. I understood you yesterday to talk of an occlusion.

A. Occlusion and partial occlusion—I am explaining now there wasn't complete occlusion because if there would have been, he would be completely paralyzed; he would have been notified of this well before it happened. We didn't have no symptoms of it until the time it happened.

Q. There wasn't a symptom you can find a trace of to show it was in the vena cava, that there was a thrombus in the vena [330] cava?

A. That's right.

Q. There wasn't one symptom any place?

A. No, I didn't find it.

Q. How long, Doctor, does it take a thrombus to develop in the vena cava?

Mr. Doepker: I am going to object to this because it is repetitious. He went into that before.

Mr. Angland: He didn't answer it, your Honor.

The Court: I will overrule the objection. Answer.

Q. How long does it take to develop?

A. Nobody knows. It took seven months in this case. I have never seen a case like that.

Q. You have never seen a case where it took seven months?

A. I have never seen a thrombus of the vena cava, except I told you I looked all through the

(Testimony of C. H. Horst.)

literature for it. It is the only little history I found about it. I found it described by the surgeons about thrombi, emboli coming from the pelvic veins going up through the vena cava into the lungs, and I have read their articles where they have described obstructions of the vena cava, but I myself—and I have attended many clinics, but I have never seen anybody describe it. I have seen one where the superior vena cava was described. They are very rare cases. I answered it, seven months.

Q. Doctor, at no time does the growth just stop? If you [331] have a thrombus begin to develop on the wall of the vena cava, it attaches itself, it becomes a part of the wall of the blood vessel, isn't that right?

A. Providing it is organized, providing that the cells grow from the wall of the vena cava into the thrombus, but if it sticks on there by reason of thromboplastin, it is not securely attached to the wall, and therefore it is more liable to get in the circulation one way or another. If it was a little thrombus there, it could be swept up, but it was a heavy thrombus. Why do I say it **was heavy, I never** saw it? I'll tell you why it was: Look at the damage it caused.

Q. You never saw it and can't find any symptoms of its existence before January 7th, 1950. Now, it continued to grow. If there was a thrombus in there, it wouldn't just become dormant in there, it would continue to grow all during that seven month period?

A. That's right.

(Testimony of C. H. Horst.)

Q. What, in your opinion, is the normal time for a thrombus to grow sufficiently to fill the vena cava?

A. Well, I don't know. It might be seven months, and it might be two years. If it took a long time, there would be a very well established collateral circulation, and the doctor in attendance would see it, like there were varicose veins on the man's abdomen or his chest going up into the neck. When those developed, the man, or the doctor would say, "We have got an obstruction here some way because this is collateral circulation," but in this particular case it developed rather rapidly and must have loosened up at the time he was in the hospital. January 7th when he got out of bed, he says, "I got this pain." It is just as characteristic as it can be of a thrombus slipping.

Q. It is so large it slipped against the flow of the blood?

A. That's right.

Q. Doctor, do you have an explanation of why it did not stop say at the knee, where the vein, as it goes down, tapers and becomes smaller, doesn't it?

A. Yes, it would get stuck in there, and that is why he has pain in his leg. I have no doubt some fragments did go down. He has terrific pain in his leg, and it is not explainable in any such thrombus.

Q. What would occur now, Doctor Horst, if that large thrombus dropped, as you say, against the flow of the blood, down to just above the knee, what would happen from there down?

A. The leg would swell, it would get black and

(Testimony of C. H. Horst.)

blue and the thing would happen just as the history states did happen. He would be shocked, he would be unconscious, and the doctor would rush around to see what he would do to loosen up that circulation. Naturally, he would give heparin, elevate the leg, and try to see that circulation is established.

Q. Why did the doctor give heparin? [333]

A. Because he thought it was a thrombus.

Q. Now, the heparin didn't dissolve this embolus, did it? A. It did wonders on this leg.

Q. Answer my question.

A. You asked if heparin would dissolve the embolus. The right leg was involved only 24 hours. The whole damage was in the left leg and has not stopped yet.

Q. Doctor, is it a fact that heparin and other medication that was given have the effect of preventing further coagulation, but do not dissolve either the blood clot or the scar tissue that has been formed and become a part of the thrombus?

A. I don't think there has been any scarring in this. Had there been scar tissue, it would not have slipped because then it would have been a part of the arterial wall. If it has got connective tissue in it, why then it is part of the wall, and it won't slip.

The Court: We are getting off into a side issue. I would like to inquire now does heparin dissolve emboli?

A. It has that effect, yes, sir.

The Court: What do you mean? Does it or doesn't it?

(Testimony of C. H. Horst.)

A. It does.

Mr. Angland: To understand that, I think you have to have an additional explanation.

The Court: It may be, I don't know.

A. When they give it, it clears the blood vessel walls as [334] it did here.

Q. Doctor, an embolus ordinarily—let's forget this one—an embolus ordinarily consists of the scar tissue that has formed and become a part of the vessel wall, isn't that the usual embolus, or it is a blood clot that is formed immediately, it is one of the two?

A. The first thing formed is the special cells I have been describing here this morning, and they are attracted to the wall of the vena cava by reason that there is a thromboplastin, and those little cells plug that up. It is Nature's way of stopping hemorrhage.

A. An ordinary thrombus attaches and cleaves right to the blood vessel wall and in effect will eventually become just a part of the wall, won't it?

A. Provided connective tissue grows into it from the wall. Where would a clot get any connective tissue if it didn't grow from the wall? That is what we call an organized clot. It didn't happen here. He would have had an obstruction of his vena cava and his legs would have swelled, and the diagnosis would have said, "Complete thrombus, vena cava," and they would have to go in after it. This clot was just a soft clot.

Q. It was a soft clot?

(Testimony of C. H. Horst.)

A. It was attached to the wall very frailly.

Q. It was attached to the wall very frailly? [335]

A. Yes, it wasn't with scar tissue.

Q. It happened to hang there and the blood flowing up past it didn't bother it at all until suddenly it dropped off?

A. Yes, because the contusion of the wall of the vena cava was so great that the thrombus was extensive. It involved not only the lower two-thirds of the vena cava, but the right and left iliac veins.

Q. You didn't get any occlusion in Mr. Hennessey's case?

A. It was partially occluded; it must have been partially occluded. I explained why that was, because he didn't develop any collateral circulation that was visible.

Q. Heparin and dicumarol, what are they supposed to do?

A. Dicumarol, that comes from rotten clover, and sheepmen found out their sheep were bleeding to death——

Q. I want to know the effect of the medicine?

A. It will render the blood fluid and take away the prothrombin element.

Q. It prevents enlargement of an embolus, isn't that the purpose? If you have an embolus, what you hope will happen is that it will attach to a wall and become a thrombus?

A. Yes, you hope it will be absorbed, and it does help that way. It may not be that way in the

(Testimony of C. H. Horst.)

books, but certainly and generally it does. When you get heparin, it saves the patient. The people who get heparin ordinarily have thrombosis of the heart vessels. [336]

Q. The purpose, Doctor, as you said, in the books, is——

A. It helps to dissolve and loosen up the clots.

Q. ——it helps prevent further clotting, isn't that the real purpose of it, so the embolus will have an opportunity to attach and become a part of the vessel wall? A. That's right, I think.

Q. And prevent further clotting, that is really what it is intended for, Doctor?

A. It is a portion of it. It is to help to dissolve the clot, and dicumarol helps to make the clot liquid and prevents formation of clots. It is certainly an efficacious drug.

Q. If there is any scar tissue in the clot, the heparin and dicumarol won't dissolve that?

A. The scar tissue is a part of the wall.

Q. Most thrombi have scar tissue in them, don't they?

A. They do if they are from the arterial side, but from the venous side, it is hard to find out where there is a thrombus because when it comes after operations, the common place for thrombi to develop is in the pelvic veins, and it goes on through and lands unobstructed in the lung, and the patient passes out when it arrives there.

Q. That is the type of thing you mentioned Sat-

(Testimony of C. H. Horst.)

Q. So that the occlusion then that you spoke of affecting the [339] spinal cord was actually down below the end of the spinal cord?

A. Yes, it was below it, it must have been.

Q. The spinal cord is up here in the second lumbar?

A. That is correct.

Q. So you had the effect on the blood vessels leading into the spine, but not into the spinal cord?

A. You see, the spinal cord is within the spinal canal.

Q. That's right, but the important thing, the cord ends up in the second lumbar?

A. Yes.

Q. And then you have a number of nerves coming down below, isn't that right?

A. That's right, but there is a plexus of veins within the spinal cord, there is some very complex veins. When these little lumbar veins connected with the plexus of veins that surround the equinus—that is, the horse's tail, they call it, because those are big nerves that come off of that end of the spinal cord. Now, then, that emboli could have got in that plexus of veins and ascended and gotten into the spinal cord itself.

Q. Yes, but your occlusion down here below the second lumbar region wouldn't go back into the spine, it would hit one of these nerves, so to speak in the layman's language, it would strike one of these nerves that goes to make up the [340] horse's tail that you spoke of, is that right?

A. They are inside of the vein, and they find

(Testimony of C. H. Horst.)

their way up to the cord by following the course of the veins.

Q. Now, Doctor, what I am getting at is, if you have it below the second lumbar region in a vein going back into the spine, and it strikes one of these nerves, it is going to affect a good deal more than just a foot or just a knee, isn't it?

A. It wouldn't hurt the nerve at all; if it went there, it wouldn't go into the nerve. That lumbar vein enters a plexus of veins surrounding the cord, it doesn't go into the nerve.

Q. How does it affect it? Now, as I understood you——

A. It affects it, it backs up, and when it gets into the cord, it destroys certain nerve tracts. The tract it disturbs is the tract of connecting nerves that connects the upper motor tract with the lower motor tract; and that wasn't a very extensive lesion, and the right leg became spastic. The upper motor neuron is intact. It controls flexion and the lower motor neuron. This man has lost his reflex below and he had the symptom of his foot sticking out.

Q. You don't have a nerve affected in the horse's tail, so to speak, and that would be consistent with the region here involved. So far as the spinal cord is concerned, you don't have just a nerve that might be affected that runs out like a fish line down to the bottom of the foot, do you? [341]

A. If the embolus goes up through the plexus and attacks the spinal cord.

(Testimony of C. H. Horst.)

Q. If it gets into the spinal cord.

A. If it obstructed those veins. If there is an obstruction of the intervenous circulation, as I told you before, nerve cells die, and certain of this man's muscles are partially paralyzed.

Q. Supposing it doesn't go up into the spinal cord, what would happen?

A. What doesn't go up in the spinal cord, the embolus?

Q. The embolus, it stays down below the second lumbar region?

A. If it doesn't go up, the man wouldn't have the condition of his left leg that now presents itself.

Q. It would be a very different condition?

A. He would have a good leg if it was that way. He has got a leg partially paralyzed, and it is hyper-active; the tone of the muscles is just hyper-active, it is spastic. That means that all the sensory impulses from the leg and foot go up and are turned right back without any control because of the destruction of the connecting neurons within the spinal cord.

Q. Dr. Horst, you spent considerable time you stated, and finally found this book that you thought would support the idea of an embolus in the vena cava, and that is how you arrived at the determination that that is what happened to Mr. Hennessey, is that about it? [342]

A. That is the reason I introduced the book, and that is the reason, I explained several times, I base that on. This was a very unusual condition that

(Testimony of C. H. Horst.)

developed in the vena cava, and nobody that ever comes here will be able to say anything else.

Q. Nobody that comes here will be able to say where the embolus came from?

A. That's right, unless they take this view.

Q. No doctor knows where it came from?

A. I think the book shows it could occur. There is a history from one of the best surgeons in the world. Here is a man with a leg——

Q. This book written back in 1883 says it is possible for this to happen?

A. It says it did happen, because it describes it.

Q. In that case he fell over immediately?

A. Yes, but then he fell over immediately. We are taking a view of the book that I didn't wish to be discussed. My purpose in showing the history was to show that an embolus could occur in the vena cava, that it could stick there, and there was collateral circulation. The man's life was wrecked, but he still lived. My purpose was to show emboli could develop there, and the other fellows say it couldn't because it would have to go up instead of down.

Q. Your position is that it could have happened in this case?

A. What else could it be? [343]

Q. I am not a doctor.

A. I don't accuse you of being one. What other view could be taken of this? Nobody offered an explanation of it.

Q. No one knows where the embolus came from?

(Testimony of C. H. Horst.)

A. I showed where it occurred.

Q. It is possible for it to have occurred in the manner which you state? A. It is.

Q. It is within the realm of possibility?

A. That's right.

Q. And that is your testimony here?

A. Yes, that's right.

Mr. Angland: That's all.

Redirect Examination

By Mr. Doepker:

Q. Doctor, in this instance, do you, or would you say whether or not that is the reasonable probability of this case? A. Yes, sir.

Mr. Doepker: That is all.

The Court: Nobody else has any questions? I don't want to engage in an examination of the doctor, except I do want some more information. The doctor talked about this force causing the expansion of the veins and everything. How much force does that take? What is the situation with reference to that [344] feature? I think the doctor said it was his whole theory of this thing, that it was based upon the idea that there was a force of 120 pounds falling from a height of 12 feet, hitting the man directly. I want to find out why the doctor thinks the history of the previous automobile accident has no bearing on the case in making or forming his opinion of the thing. It seems to me there are an awful lot of things you had better clear up

(Testimony of C. H. Horst.)

for my benefit on one side or the other, or both sides. It is almost noon now. Court will stand in recess until two o'clock.

(Noon recess.)

Mr. Angland: To bring out the matters your Honor suggested, do you want the defense to continue cross-examination, or do you want the plaintiff—

The Court: Whatever your pleasure is, I don't care. I just thought it should be called to the attention of both parties. It is something, it seems to me, we should know something about.

Mr. Doepker: May we have the right to reopen plaintiff's case with this witness?

The Court: Very well.

Q. (By Mr. Doepker): Let me ask you this brief question in connection with the history in this case of Mr. Hennessey's long confinement in St. James Hospital for this pneumonia that complicated into nephritis, and further considering that as late, I believe it was in the year 1941, September, 1941, I [345] believe, as late as that time, in the examinations which he had taken with Dr. Childs in Seattle for the entrance into the Naval Service, and also with the examination in connection with his being drafted. I want to know if there is anything in that record there that we are referring to, the fact that even as late as 1942 there may have been some residuals of nephritis, do you

(Testimony of C. H. Horst.)

consider that as a material thing in this case at all?

A. No, I don't. I consider it. It was a case of chronic nephritis, and it was a severe one, and my examination of the urine was negative, and it had no relationship whatever to this accident, so I discarded it.

Q. Did you observe that during the time he had this nephritis, that is, looking at the chart of the St. James Hospital, was there some marked thing in there that you mentioned to me the other day? I am talking now about the St. James Hospital chart, Doctor.

A. Yes, sir.

Q. Was there some marked thing in there that caused you to comment upon that hospitalization?

A. There was, I examined the urine examinations, and most of the urine examinations, in spite of the fact he was in the height of his attack of chronic nephritis, the specific gravity was always 1.024 or 1.026, and once or twice it got down to 111, and it showed that when the gravity mounts, it means that the kidneys are, after all, having a good ability to discharge [346] and function, and I examined this man, and I didn't find any albumin at all in his urine, and I see in this report here that the Army didn't find it either, but Dr. Shanley says there was a trace of albumin present, and at that time in 1941, his kidneys were found that he had recovered, but because of the serious condition that he was in with this edema in his abdomen, they were afraid to accept him. The physical examination

(Testimony of C. H. Horst.)

was not completed because of the very definite history of nephritis and hospitalization for nine months for this condition. The urine, however, was examined, which showed albumin. This, together with the history above, and the physical evidence of past distension of the abdomen due to edema was considered disqualifying. That was what anybody would have done in the Army because this man certainly had a severe case of nephritis, but I didn't think it had any relationship to this trouble.

Q. Is nephritis considered by the medical profession as an infectious disease?

A. No, I don't think so. It is considered an inflamed condition of the kidneys; they don't discrete the urine properly; they are clouded.

Q. May it be said in your study of this case you don't consider this nephritis as material so far as this case or Mr. Hennessey is concerned that we are considering here today?

A. No, it would be discarded in any fair consideration of the case. [347]

Q. Now, there is another matter; there is no charts here. I think I asked you about it in a part of our examination. That is the automobile accident that occurred between Toston, Montana, and Three Forks, Montana, in the year 1947. Mr. Hennessey's car rolled over, and in that accident he sustained an injury to the right shoulder which, so far as the injury to the right shoulder is concerned, is very similar to the injury he sustained when the man fell

(Testimony of C. H. Horst.)

on him. I know in your history you have mentioned that, and that you have stated he was recuperating from that shoulder injury in 1947 for a period of about six months. Now, then do you have any opinion, or do you consider that there is any similarity between that accident and the one that you have attributed this cause to?

A. No, the injury that happened in the automobile was—the automobile turned over, and the man was rotated over if he went with the car. This accident was a pressure accident; this is where a man of 120 pounds fell on this man's shoulder and on his back, and it pressed the blood and all the organs in the body down toward the feet. It was a compression of the vascular organs that was especially detrimental in his case because they were all full of blood at the time the accident occurred. When additional pressure came down on them, then they were distended and the phenomenon I described time and time again this morning occurred.

Q. All right. Now, Doctor, in regard to this compression, [348] can you give the Court as illustrations of what occurs in these compression injuries at times what different things have you observed in compressions of that nature, or more severe, which resulted in even a crushing of one of the bones of the spine, or two or more of the bones of the spine?

Mr. Angland: Just a minute; I will object to that. There is no crushing of bones of the spine in this case, your Honor.

(Testimony of C. H. Horst.)

Mr. Doepker: I want to illustrate. The Court is trying to compare this force.

The Court: I don't think we are concerned with some other different kind of case in which bones are crushed; I know there are forces which will crush bones, but you have gone into the fact, and the doctor has testified to the point that the blow having come on the shoulder, it created a rush of blood, it distended the vessels and so forth. Now, go into that line of thing. What kind of blow is necessary, and how much pressure, and how you gauge that.

Q. Doctor, the testimony in this case is, in the depositions and in the case, that this ceiling in this men's wash room was 12 feet high. The lavatory that Mr. Hennessey was washing his hands at, I believe the evidence shows was 30 inches from the floor; he is six feet and a quarter in height, but he was bent over, I believe the record is he estimated, about 30 degrees. There is no evidence in the case that he was expecting any blow that he was set for or braced for, but this came. The only [349] definite evidence that we have is that Mr. Livingston himself weighed between 115 and 130 pounds during a period of time in about this time, so we could estimate about 120 pounds, I believe would be a fair estimate. Now, he came through—it must have been a compo-board or some like substance, and also some insulation, because there was some insulation fell on Mr. Hennessey. When Mr. Livingston came down, Mr. Livingston testified he went to the floor, and that the only injury he sustained was a bruised

(Testimony of C. H. Horst.)

knee, a slightly bruised knee, that is what he said, in that fall when he came to the floor, all that he got out of it was a slightly bruised knee. Now, then, I want you to assume that situation that has been described to you there. Would that lead you to feel that was a sufficient force or not to distend those blood vessels by the falling of this human being upon Mr. Hennessey, whether it was a direct, or whether it was a glancing, blow?

Mr. Angland: I think counsel stated that the only evidence is that he fell—I think counsel should modify that by the fact that the witness Livingston doesn't know whether he struck Mr. Hennessey when he came down, or whether he didn't. It further was not shown by the deposition that the knee injury was received when he struck the floor.

Mr. Doepker: Well, we asked him that, your Honor, he hasn't—

The Court: I haven't read the deposition, but in any event, it [350] doesn't make any difference so far as this witness' testimony is concerned. I don't see that your objection amounts to anything, counsel, except that all of the evidence so far, so far as I can recall it, is that this was a glancing blow. That is the way it was described by Mr. Hennessey and everybody else who has mentioned it.

Mr. Angland: Mr. Livingston in the deposition states he doesn't know whether he struck him or didn't.

The Court: Of course, you would have to assume he struck him. In any event, assuming he was

(Testimony of C. H. Horst.)

struck, it was a glancing blow. Now, based upon that theory, you can inquire.

Q. (By Mr. Doepker): You heard that. If it hit him on the shoulder and back——

A. Yes, I considered that in my history, and my answer to that is this: that the blow that he received was mostly absorbed by himself. I base that on the fact that the man who fell upon him had minor injuries, but the blow caused by the fall from the ceiling was the principal cause of this man's later disturbance, and it was a pressure blow on his shoulder that brought this about. Had this man fallen and missed him, the fellow who fell, I don't know what would have happened to him, but I'll tell you this, it would have been more than a skinned knee. You can't fall 12 feet with more than 120 pounds and not cause some disturbance. You must remember this: the injured man was not knocked down; he did hurt his [351] shoulder, and the shoulder had been injured before. He was concerned about the shoulder mostly, it didn't come into his consciousness, rather, of any other injury, but it was this blow that subsequently is the cause of this thrombus.

Q. Now, passing from that, Doctor, passing——

The Court: I'll tell you, before we pass from that, I would like to get it clear. The doctor keeps saying it was a direct blow; the evidence says it was not a direct blow. The whole testimony of this doctor is just out of the case if he is going to insist

(Testimony of C. H. Horst.)

this was a direct blow he is talking about, that that is what it took was a direct blow. If that is what the doctor says it is, fine with me. I don't want to finish his testimony, but I am telling you his testimony is worth nothing, because the evidence in the case is that this was not a direct blow, it was just a glancing blow.

Mr. Doepker: Your Honor, the man didn't stay there; the man testified he was hit on the right shoulder.

The Court: If you are satisfied, Mr. Doepker, go ahead. It is not up to me. I am telling you the problem we are faced with.

A. It is my fault. I will say a glancing blow, then. It fell right down.

The Court: What is the difference between a glancing blow and a direct blow?

A. It fell down and hit this man. If it fell on top of him [352] and crushed him down, it would be a direct blow, and if it hit on his shoulder and glanced off, it would be a glancing blow. The main issue is did it cause this injury. Whether he had a direct blow or a glancing blow, it still would have caused this injury.

The Court: Would it make any difference what part of the body hit him?

A. No, the evidence shows he was hit on the right shoulder. If it was a direct blow, you would say it should have hit him in the middle of the back. It hit him on the right shoulder and caused a rein-

(Testimony of C. H. Horst.)

flammation of that shoulder previously injured, but that wasn't the main thing in this man. The main thing was 120 pounds falling on his shoulder. It was a compression blow, which is the essential thing here. It was the effect of this 120 pounds falling directly on this man's shoulder and sending impulses throughout his body, which centered on the venous vessels and caused that thrombus.

The Court: What was the weight of 120 pounds falling the six or seven feet when it struck Mr. Hennessey, what was that pressure?

A. I couldn't calculate it. If it was put up to mathematics, I think I would have to have an engineer figure it out. I know 120 pounds falling down increases in weight.

The Court: Well, what effect would the position that Mr. Hennessey was in have to do with what the result would be? [353]

A. It would have a lot of effect because it would give a greater surface for the 120 pounds to light on if he was bent over as he was supposed to be, over 30 degrees. Therefore, the weight of 120 pounds coming down on the right shoulder and glancing like that would be of greater force than one that would glance off his shoulder coming down on the right shoulder and glancing like that would be of greater force than one that would glance off his shoulder coming down if he was standing erect.

The Court: And considering the pressure that is necessary to create the distension of the vessels

(Testimony of C. H. Horst.)

that you have described, what would that have to do with reference to the balance of the person who was hit; what effect on the balance would a weight of that kind have hitting a person not expecting it?

A. Well, in this particular case, it didn't throw him to the ground, nor did he fall, so it didn't have any effect on his balance. He stood the whole thing.

The Court: Does that mean anything to you with reference to what the pressure was?

A. Yes, it means it was a glancing blow and the man was bent over, and he received the impulse, 120 pounds of his body, and the result was that it distended these vessels. That is what it means to me. It means more than if a feather fell on him. A feather wouldn't hurt him at all, but if he has 120 pounds fall on him, that would be reflected in the disabilities that have developed in this case.

The Court: And whether or not it was a direct or glancing [354] blow, could that be determined from the fact that he didn't lose his balance?

A. No, I don't think it could. You have to take the history of the case as it was given; you have to take into consideration only what was given. A man fell down on him weighing 120 pounds while he was bent at an angle of 30 degrees. That fell on him, and that was the pressure that was transmitted through his body, and it, in this case, involved the large arterial trunks that were brought up in this trial.

The Court: Do you have any idea how much

(Testimony of C. H. Horst.)

pressure it does take for a blow on the body to distend the vessels?

A. No, I don't think I have ever read it.

The Court: Would a weight of 50 pounds falling six or seven feet do that?

A. It might, yes, sir. I think a heavier weight might do it; a heavier weight might crush this man to his knees, it might do that. This I do know——

The Court: Have you had any experience that would indicate to you that 120 pounds falling that distance would distend the vessels? A. No.

The Court: Then what do you base——

A. I base it upon the history and findings.

The Court: You base it upon the conclusion of what happened thereafter? [355]

A. Yes, sir.

The Court: Is that the only thing you base that on, Doctor?

A. I base it on that and on the subsequent history and the development that occurred in his body. There are all kinds of injuries. I have never had occasion to examine any person that had a man fall through a ceiling on him. I think that is a rare injury.

The Court: Have you had occasion to examine anyone who had an object fall on him, not a man?

A. Yes, I have seen people who fell down in places and people who have been in caves in the mines when there has been a slide of ore. I have considered those kind of cases, and, of course, when a man gets buried in the ore, those are similar cases.

(Testimony of C. H. Horst.)

Sometimes people escape without any serious injury, and other times they have all kinds of injuries. I don't see—this is a selective case, this is where an arterial system filled with blood has been suddenly pressed upon by 120 pounds pressure, or probably more, and it has caused these disabilities we have discussed in the last few days.

The Court: Have you had any experience, or do you know what the comparative pressures were, assuming that a person fell the six or seven feet from the ceiling down to the height of Mr. Hennessey's shoulder, what the comparative pressure between that would be, and the case you referred to in the book where the runner held his breath and ran for 120 yards in the hurdle [356] race; what would be the difference between the pressures in those cases? Is there any experience upon which you can tell us?

A. I have never studied it from the standpoint of how many pounds pressure there was.

The Court: Is there some relation between it?

A. I think there is. Certainly, if you hold your breath and your heart beats, the pressure will increase in those vessels, because the heart keeps pumping all the time. The man holds his breath and pressure will come on those veins and arteries.

The Court: Is there anyway you can compare that pressure with the pressure that results from a glancing blow or a direct blow, or any other kind of a blow; is there any way you can judge it?

A. You could only judge it by comparison, what

(Testimony of C. H. Horst.)

you would think. I don't know how it was done experimentally. I don't know whether anybody has ever tried experiments to determine the difference in pressures. All people run——

The Court: Well, would you say that the pressure that resulted from the man dropping in this case as heretofore described to you upon Mr. Hennessey's shoulder was as great as the pressure built up in the book?

A. I think this was more.

The Court: You think the pressure in this instance would be more?

A. Yes, sir. [357]

The Court: Why?

A. Because I don't think that holding the breath in the lungs and the heart pumping the blood through the veins could be comparable in strength with a man falling 120 feet. I think a man falling——

The Court: You don't mean 120 feet, you mean to say five or six or seven feet.

A. Yes. I think that man would cause a greater pressure on those vessels than a man running 100 yards and holding his breath; yet that history shows that man had a thrombus the entire length of the venous vein. All men don't have the same material. Some men have stronger materials than others. That would have to be taken into consideration, and the age of the person; and I have never considered the effect of the weight of a man falling on a man's

(Testimony of C. H. Horst.)

back. The only thing I have considered, your Honor, is the effect it had on his body. Some people would have their legs broken, that would have been sufficient; some people could have developed hemorrhage in their abdomen and have no trouble with veins at all. This man's trouble centers in the veins.

The Court: Of course, if a man falls on you and breaks your leg, it is obvious it just took that much weight to break your leg.

A. That's right.

The Court: In this case we are dealing with a different matter; [358] we are dealing with a matter in which we have to make deductions. It is not that evident.

A. No.

The Court: It is not patent, so we have to deal with scientific knowledge and deductions resulting from your experiences.

A. You have to deal with what the accident caused, too, when that came down. That went through his veins. It could have caused an excessive hemorrhage in his abdomen; it could have broke some blood vessels, and there would have been a big blood clot in there if it broke a big blood vessel. What happened here? He injured the vena cava, and it developed a thrombus. If the weight fell down and broke his ribs, then that would be the cause of it. There is multiple injuries could occur from a weight falling any distance and hitting a man on the shoulder or back. It could have

(Testimony of C. H. Horst.)

paralyzed him; it could have caused him a myelitis in his spine, but we have to deal with the conditions that the injury caused. That is what I think this caused here, I think the veins have become over-distended by reason of the crushing force from this man falling on him; I think the force was broken to a large extent for the other man who glanced off of him because he had little or no injury, so this man received the maximum force.

The Court: In your opinion, the force created in this instance was greater than the built up pressure in the case you [359] cited from the book you have read?

A. I think it would be, because I think the falling of 120 pounds would be greater than the pressure that could be exerted by a man holding his breath and the heart beating against it.

The Court: A heart beating in what condition?

A. He was holding his breath and the heart beat just the same. The heart was sending the blood through the arterial tree and it was being forced up in the venous system. The man held his breath, and it was caught in between those two pressures.

The Court: It was a heart beating in the course of a 120 yard hurdle race. Wouldn't that change the pressure?

A. That was what caused the pressure, that race. It was what caused it. When he was at ease, it was the normal pressure you do have. It is a normal condition. He made an unusual condition of it.

(Testimony of C. H. Horst.)

The Court: Do you know how much pressure ordinarily the heart raises when it beats?

A. We measure it with the blood pressure machine, and it is 120 mm. of mercury high of pressure, and 80 of low pressure, and that is determined by the sounds of the heart through the vessels.

The Court: That goes up as the heart activates?

A. Yes, sir. Why, we take and put a band around the arm, and after the arteries compress against the bone, and we listen [360] and there are no sounds that come through the stethoscope—that is applied to the vessels on the arm, then we let it up. First, we hear the heart beat. That is systolic pressure; then when the heart sounds disappear, that is diastolic pressure, and the pulse pressure is the difference between the high pressure and the low pressure, which is usually 50. We call it pulse pressure.

The Court: How high does that build up under exertion?

A. On systolic pressure, it might build up to 180, and low pressure would go up to 100 or 110. As soon as the patient stops running it reverts to normal. If a man had blood pressure of 180 and he exerted himself that way, it might go up to 220. If he had bad vessels, it would be bad for him, but I have never seen anybody who had a stroke——

The Court: In the case you referred to, it appears that the pressure that was exerted in that case

(Testimony of C. H. Horst.)

was a continuing pressure for a period of some 16 seconds.

A. That's right.

The Court: In this case, I suppose the pressure was just momentary, or was it?

A. While he was running, of course, it was. When he stopped, he started breathing again, and the reason that case was brought by me in evidence was that I couldn't find any place where there was a thrombus of that vein by reason of any embolus that arose in the body. The emboli that were always considered in the [361] cases were those that arose——

The Court: From the arterial side?

A. Yes, that's right.

The Court: Here is what I am faced with, Doctor, of trying to find out: We don't have any history of the thrombus or emboli arising on the arterial side and working as you say it did in this case, except as we refer to this instance. Now, we have got to then have a case that is similar to that instance, don't we, in order to correlate the two?

A. That is what we have here. I didn't find any other, your Honor.

The Court: What is the difference between a pressure built up and maintained for 16 seconds, and a momentary pressure?

A. The only difference is the sustained 15 minutes more.

The Court: 15 seconds.

(Testimony of C. H. Horst.)

A. 15 seconds more.

The Court: The fact that it extended for that length of time, would that tend to weaken the walls of the vessel any, rather than just a momentary expansion?

A. No, it wouldn't, it would be just the same, because both cases have the same condition develop after them. The man that was running 16 seconds, he developed a thrombus of his vena cava, and the man who had the falling from the ceiling, he had a thrombus.

The Court: You always assume, of course, that this is just [362] exactly what happened. We have to proceed a little back of that, and you have to tell me is there any difference?

A. Between 16—

The Court: Between 16 seconds' pressure and one second?

A. Just 15 seconds difference, that is all.

The Court: Does that make any difference in the effect it would have upon the wall of the vessel?

A. It has to be the same kind of a vessel. It can't be Doecker's vessels and my vessels, they are not exactly the same. Then, you have to tell me what kind of vessel he has got, to answer the question.

The Court: Well, you tell me then, I can't tell you. Were the vessels in this case, the case you have referred to, the same as the vessels in Hennessey's case?

(Testimony of C. H. Horst.)

A. Well, the man that ran here was about 21 years of age, and Hennessey is 36 years of age, so Hennessey's arteries are a little bit older than his, and probably they would be a little more responsive to the pressure than the younger man's, but the younger man had the worse condition that developed, because it said that most of his vena cava was involved in this thrombus. So, how can one do that? The way the medical people do it is to try connecting up what kind of history; if he had three or four accidents that this man had, what kind of one, what would be blamed for this thrombus developing; and it certainly wouldn't have been a shoulder injury; it wouldn't have [363] been—a man in a car rolls over and over, that pressure wouldn't come that way, those were on the side, and this fall with this man—so that it is perfectly reasonable to suppose that that injury that has developed there is the cause of his thrombus, and all other considerations in this case are all thrown out. They don't hold water.

The Court: Don't misunderstand me, I am not arguing with you, I am not concerned with it at all. These things don't make sense to me unless you can correlate them. When, in all the history of medicine, you have to go back some 90 years, or whatever length of time that is, to find another case where there was a thrombus of the vena cava, and then say, because that happened at one time in 1880—whenever this case occurred that you have

(Testimony of C. H. Horst.)

referred to—I now think that is what happened in this case, then in order to justify that kind of a conclusion, you are going to have to, it seems to me, point out the real similarities between what happened in that case and what happened in this case; and why hasn't there been some history in the meantime of that very same thing happening in medical history?

A. The only reason is I didn't have access to a very extensive library to find that out, but the reason I brought this case in is to show a thrombus could occur in the vena cava without being transferred from some other source in the body, that it developed in that vena cava itself. [364]

The Court: But that is the only case in medical history.

A. Judge, that isn't fair to say that.

The Court: That is all you have told me about; that is what I am stuck with. Tell me about other cases.

A. I haven't got other cases. The reason I brought that is to show it could form in the vena cava.

The Court: Yes.

A. And further that the reason it stuck there is because of the injury to the wall of the vena cava, and then the development of the clot was shown to you for the reason it showed how blood forms a clot.

The Court: Doctor, do you understand that so far as this Court is advised, this is the second case

(Testimony of C. H. Horst.)

in history in which a thrombus of the vena cava has occurred, so far as you have told me, and I don't know anything else about medicine, except what you are telling me, so far, this is the second case in medical history.

Mr. Angland: I might add something further for the Court there, there is certainly a difference in the factual situation.

The Court: That is what I am getting at. If this is the second case of it, and the only experience you have is this prior history you have referred to in the book in order to substantiate your judgment that this phenomenon has now again occurred, it would seem to me you would have to correlate this condition to conditions that existed then. [365]

Mr. Doepker: May I say, your Honor, he has done that. Distension of blood vessels——

The Court: Very well, pass on to something else. You can argue it later.

Mr. Doepker: Your Honor, I think if the man had access to a history of all kinds of emboli, he might find some others. The question for your Honor to decide is: Is this reasonable or unreasonable.

The Court: Yes, but what I am up against is that this is the second time in the history of medicine that it occurred.

Mr. Angland: As I view the evidence as to this, he says it is possible it could have happened.

The Court: Let's not go any further. Mr. Doep-

(Testimony of C. H. Horst.)

ker is satisfied and you can argue the matter.

Mr. Doepker: Very well. That is all.

Recross-Examination

By Mr. Angland:

Q. What is an alkalosis?

A. I know nothing about alkalosis.

Q. Alkalosis?

A. Yes. I know very little about it. It is an alkaline condition in the blood.

Q. It develops in the blood?

A. Yes. [366]

Q. Can it develop by reason of a person not breathing?

A. Yes, that would be carbon monoxide.

Q. It is possible, isn't it? A. Yes.

Q. It is possible, Doctor, to have a man hold his breath and give him a quick pull, if you know what I mean, just have him hold his breath and give him one of these hugs, it is possible for him to get an alkalosis then, isn't it?

A. If he would hold his breath and he would absorb carbon dioxide, he would have alkalosis, yes.

Q. That's right.

A. It is only a temporary thing. It is an interference with respiration and passes off as soon as he takes a breath.

Q. It can build up, Doctor, to a point where it kills a man instantly, can't it?

(Testimony of C. H. Horst.)

A. Yes, you mean have a rope around his neck and hang him.

Q. Let's not go to a rope around his neck. Holding the breath and a hug of the chest, is that possible that could kill him, lack of oxygen?

A. The normal man?

Q. Yes.

A. I have never heard of it, and I have never heard of such experiments being tried. I don't think you could kill a man that way.

Q. Do you think the case you told about of the runner might [367] have been an alkalosis building up that later developed into the condition described in the book? A. It was more. This case——

The Court: Let's not go into it again, just answer his question.

A. No, I don't think so; I don't think alkalosis caused any thrombus of the inferior vena cava.

Q. Notwithstanding the fact the runner dropped over immediately when he hit the tape?

A. I didn't say that.

Q. That is what the story said. The fact he dropped over immediately and Mr. Hennessey has an embolus seven months later, that fact makes no difference whatever to you as to the similarity of those two cases?

A. I didn't study that case with the idea it would be brought in for comparison, except for one thing, to show that an injury to the wall of the inferior vena cava could cause a vascular clot to

(Testimony of C. H. Horst.)

form. I explained why that was done and tried to bring this in and tried to correlate with this other. I never gave it the slightest bit of consideration. I brought it in simply to show that a clot could form in the vena cava. I don't want to say that was the only clot in the world that ever appeared in that form. I merely stated it to you to show that a clot could form and did form in that vessel.

Q. Your purpose was to demonstrate that it is within the [368] realm of possibility that that is what happened to Mr. Hennessey, that it is within the realm of possibility, is that right?

A. That's right.

Q. Your reason for so testifying and referring to that story is to show it is within the realm of possibility?

A. Yes, sir.

Q. That a thrombus could have developed in Mr. Hennessey's case?

A. That's right.

Q. The purpose is to show us that this could happen, it is within the realm of possibility?

A. Yes.

Q. It isn't a normal thing, it isn't the usual thing?

A. That's right.

Q. Doctor, did you consider in your diagnosis and your analysis of this case the fact that Dr. Soltero treated Mr. Hennessey for a right shoulder condition arising out of the automobile accident?

A. Yes, sir.

Q. He gave him diathermy, I believe, wasn't it; deep therapy is the same thing, isn't it?

A. He treated him with diathermy, and perhaps

(Testimony of C. H. Horst.)

some deep therapy. He advised him to go to an osteopath, stating that was the reason a medical man couldn't treat it with much satisfaction. [369]

Q. Did he advise him to go to an osteopath after the automobile accident or after the accident down at Pocatello? I don't believe it is necessary to go into your notes.

A. I would say it was after Three Forks. I have it here, I would rather wait and see.

Q. Your best memory is that it was after Three Forks?

A. Here it is. It was June 2nd, it was after, the next day, it was right after the accident on June 2nd, 1949. "I went home," then he said, "The next day then I went home to Billings. My right shoulder was stiff and sore. I consulted Dr. Soltero, M.D. He gave me three diathermy treatments for my shoulder. He told me it was a type of injury that a medical doctor could not do much with and that whenever it bothered me again, to go to a good osteopath and have it rubbed out. After that, I had a nurse rub it out when necessary. I did not need my shoulder in my work, so I just let it go."

Q. Doctor, did you consider the fact that Dr. Soltero gave Mr. Hennessey diathermy treatments after the automobile accident, that so far as the right shoulder was again concerned, he again gave him diathermy treatments, substantially the same treatment following the accident at Pocatello, Idaho, have you considered that?

(Testimony of C. H. Horst.)

A. I didn't know Dr. Soltero gave him treatments after the automobile accident.

Q. He treated him on both occasions and the injury was [370] substantially the same.

A. It wouldn't make any difference to me, and Mr. Hennessey didn't have anything else bothering him. It was just his shoulder. He never knew he had anything wrong with his abdomen. It was only when he got up after he had been in the hospital four days when he was told he had recovered from pneumonia. He got up on his feet, and the thing came down in his left groin. He didn't have the slightest idea of that, and it has been brought out time and time again that the man did not know the thrombus was there, and my idea was to find out the reason for the formation of the thrombus and if the thrombus could form within the vena cava.

Q. Doctor, is it within the realm of possibility—I think you said that might take two years or more to develop—is it within the realm of possibility that the thrombus began to develop there at that time from the rolling over of the automobile and hitting the steering wheel?

A. Well, I didn't think so; I don't think it was injury enough, but it is within the realm of possibility that he could have developed it after that, and it is within the realm of possibility that he didn't have anything wrong with him after that.

Q. As to what happened on January 7th, Doctor,

(Testimony of C. H. Horst.)

there are many things within the realm of possibility, aren't there?

A. If you go into the realm of possibility, there are, but, [371] you see, after the thing develops, you don't have to wander into the realm of possibility because the condition is there. If it was in parts of his heart or kidneys, it would be within the realm of possibility, it would be within the realm of possibility that any kind of condition could have occurred, but it is not within the realm of possibility that there wouldn't be any symptoms of it.

Q. Doctor, it is possible, it is as possible as your theory, I mean, that arising out of the automobile accident there was an internal injury and that created a thrombus that finally came loose on January 7th, 1950?

A. Yes, that is within the realm of possibility. The only difference would be the character of the injury. In the case of the fall by the man, that was an entirely different force that struck him than the automobile.

Q. Doctor, you have had many occasions to treat people following automobile accidents?

A. Yes.

Q. Have you ever found them crack their knees?

A. Yes, and crack their chest.

Q. The steering wheel gets them across the chest or abdomen, doesn't it, isn't that the usual type of injury?

A. That is a common type.

(Testimony of C. H. Horst.)

Q. And that is a common source of thrombus?

A. I never saw a thrombus associated with it, no. This is [372] what they do, those steering wheel accidents: They last for an unusual time, eight or nine months they suffer from that. I have never seen a thrombus develop from it, but if one did develop from it and he got pain in his legs and it went up in his lungs, if it went in the vein, then he would have a pulmonary thrombus, and then I would know it, but he never had any of those things happen.

Q. Doctor, pressure across the abdomen if you get one of those automobile accidents is very great, isn't it?

A. It is, it is very painful and it lasts a long time, and it is within the realm of possibility that he could get a thrombus from that if he injured the wall.

Q. It is within the realm of possibility that Mr. Hennessey developed a thrombus in the automobile accident, and that is what came loose on January 7th, 1950?

A. It wasn't the same kind of accident. The man falling was a very much more severe affair than the accident in the automobile that fell over on the side of the road.

Q. Was Mr. Hennessey driving the car or was he a passenger?

A. I thought Mr. Hennessey was driving the car himself.

(Testimony of C. H. Horst.)

Q. You don't know?

A. That was my impression. He says when he was driving his car—let's see what he says: "Accident, 1947, going to Three Forks, I rolled my car over between Toston and Three Forks. Injured right shoulder, couldn't lift my right arm, [373] absent from office four days; suffered from it six months." That is my notes, and because of that I don't consider it of enough importance to relate it to this accident.

Q. Of course, you know nothing about how he was thrown around in the car when he rolled over?

A. I assume he was sitting in the car when it rolled over and he must have been thrown over on his side. I don't think he got any injuries in his **abdomen**.

Q. So far as the doctor who treated him in the automobile accident, who is the same doctor who treated him after the accident at Pocatello, the treatment was exactly the same?

A. I think it would be because the injury was the same, the injury to the right shoulder, and he didn't complain of anything else.

Q. That's right, because if the embolus started from that, it didn't hurt him any immediately, did it?

A. That's right, that is the whole condition of this case. What I am trying to find out is what caused the embolus, and I got this history, and I showed to you the possibility that it had occurred

(Testimony of C. H. Horst.)

before, that it was the first concrete example of a history I had seen; then, we usually study a case, we don't take one case that is a thousand years old. My book happened to show that and it was very apropos, and I went further than that, I showed how thrombi formed in the blood. That is what they didn't know then. [374]

Q. Doctor, the thrombus that developed in this case, it is within the realm of possibility that it came from the vena cava, as you have testified, isn't it? A. Yes.

Q. And it is within the realm of possibility that it came from the aorta? A. No.

Q. It is not possible?

A. No, I don't think it would be because, I'll tell you why, because the blood streams through the arterial vessels pretty much faster, and if it were formed in the aorta, it wouldn't get around to the venous side at all, because it would have to go to the periphery and would have to go through those capillary vessels to get to the venous side, and it couldn't get through. It would depend on where that thrombus came from. If it was above—an arterial thrombus could go into the kidney, it could go into the guts.

Q. Doctor, you have talked about automobile accidents and pressure. Do you get the type of thrombus you are talking about where a fellow is rolled over and pinned under an automobile?

A. Yes, sir.

(Testimony of C. H. Horst.)

Q. It is possible to get this thing you are talking about?

A. Yes, sir, you could get pressure like I described.

Q. It is possible to hit the abdomen and get the condition you are talking about? [375]

A. It is possible, not probable.

Q. You could hit your knee pretty hard and you might develop the condition you are talking about?

A. You might develop a thrombus, it is possible, yes, and probable.

Q. So, there are many possibilities, many possible sources of the emboli in this case, aren't there?

A. Yes, they have to come from some injury to the intima of the vessels before a thrombus can form. It makes no difference whether it is arteries or veins. If the injury is severe enough to injure the wall of the vessel, a thrombus will form.

Q. Your condition, as you have described it with your emboli going down into the left leg, could be the same whether it was in the artery or vein?

A. Yes, but the artery goes down and the vein comes up, and that is where the difference is in this case. I am claiming that the thrombus was a big thrombus and involved the left iliac vein and the right iliac vein as well as the lower portion of the vena cava, and it was a big heavy thrombus, and it settled rather than went up, and it couldn't go so very far because the vessels get smaller as they go down.

(Testimony of C. H. Horst.)

The Court: We have covered all that before. Let's get on to something else. [376]

The Witness: Yes, I'll say so, too.

Mr. Angland: That is all. [377]

C. H. HORST

recalled as a witness on behalf of the plaintiff, having previously been sworn, testified as follows:

Direct Examination

By Mr. Doepker:

Q. In regard to testimony of one of the Government witnesses to the effect that certain symptoms indicated an embolus on the arterial side, you were in the courtroom, I believe, when that testimony was given about the stopping of the pulsation in the artery, and the whiteness of the legs immediately, and so on? A. Yes, sir.

Q. Doctor, from your study of symptoms in a case of this kind, as between the question of whether it is in the artery or in the vein, I will ask you to state whether or not the symptoms [432] would be relatively the same if there was a blood clot, we will say, in the bifurcation of the vena cava, or a blood clot in the bifurcation, or saddle, of the aorta?

A. Yes, the symptoms would be the same at first.

Mr. Angland: What did you say, the symptoms would be the same at first?

A. Yes.

(Testimony of C. H. Horst.)

Q. In connection with that examination, also a statement was made that a blood clot would form and occlude a blood vessel in a period of 15 days. Has your study of this as a physician indicated to you that that does not apply, does or does not apply, to the type of embolus we are considering in this case? A. It does not apply.

Q. Do you have as a simple illustration a record which is recognized by the medical profession, that is used by the medical profession in their study of medicine, and in their study of case histories, do you have an illustrative case from the standpoint of symptoms and development of clots that would support your testimony? A. Yes, sir.

Q. I call your attention to a December, 1940, issue of "Surgery, Gynecology, and Obstetrics With International Abstracts of Surgery." Are you familiar with this work, Doctor? A. Yes, sir.

Q. Is that one of the works the medical profession use to keep [433] up to date on matters of their profession?

A. Yes, that is one of the best magazines that the profession has. It has original articles in the front part, and in the back part it has digests of all the international work that is published. These abstracts that are in the back are abstracted from original articles and signed by the surgeons who have digested them. One feature about those digests is that in digesting them, they don't carry forward the case histories; and it is a very valuable book

(Testimony of C. H. Horst.)

and the digests are really remarkable. I looked through them and I soon found out that they did not carry the case histories, and I would have to get the original, and some of them are digests from European magazines, medical and surgical magazines that are unobtainable by me, and there is a few that are published in the United States, in magazines published in the United States that were available. There is one, the New England Journal of Medicine, that I have. It summarizes and has collected from the world's literature 10 cases of involvement of the vena cava and the iliac veins, and these digests show the name of the author and the age of the patient and the nature of the accident, and the manner in which the accident took place, and the final diagnosis.

Q. Now, Doctor, with respect to this one question which we have presented to you, the question of the symptoms following an obstruction of the vena cava, or the symptoms following an obstruction of a high iliac vein, and the length of [434] time of formation of a clot, have you, in this volume of December, 1940, have you a history of such a case that shows those symptoms to be the same as those that were testified to by the United States' witness, with respect to pallor of the legs and stopping of the pulsations in the artery, and so on?

A. Yes, sir.

Q. I call your attention to this volume, and ask you if you will give the Court and counsel the benefit of that case?

(Testimony of C. H. Horst.)

A. This case was reported in an article written by John J. Dougherty, M.D., and John Homans, Boston, Massachusetts. The title of the article is "Venography, a Clinical Study." The history that Mr. Doecker referred to and that I found—I found this before I testified in this case—this is the history of a 17-year-old school boy: "He entered the hospital on April 5th, 1939, complaining chiefly of diarrhea, cramping abdominal pain and general weakness. He had been well and active until six weeks before admission, at which time he suffered a head cold. Shortly thereafter diarrhea began and rapidly increased to as many as 12 watery stools a day. After the first few days, these were blood streaked, and occasionally even bright red. There was no abdominal tenderness or vomiting. A diagnosis of mucous colitis was made. 87 days after admission, he experienced a sudden severe pain in his left groin, accompanied by tenderness, coldness, and pallor of the whole leg. Arterial pulsations were absent, even the upper femoral artery." [435]

Q. Doctor, right at that point, where is the upper femoral artery?

A. The upper femoral artery is at the junction of the inguinal ligament, and then begins the iliac vein. The iliac artery comes from the knee up to the inguinal ligament, and then the artery is called the external iliac artery, then when it comes to this artery, which is called the hypogastrica artery, then the vein continues as the common iliac artery, and

(Testimony of C. H. Horst.)

there are two common iliac arteries, the right one and the left one.

Q. You were reading where pulsations in the artery had ceased, even up in the upper part of the leg?

A. I spoke of artery. The veins are the same as the arteries, this is the right iliac artery, right iliac vein, left external iliac artery and hypogastrica artery (indicating), and the same is on both sides, and the artery that comes from the knee is the femoral artery. Now, then, "A surgical consultant, J. H. felt that there had developed a deep venous thrombosis and an associated arterial spasm. A paravertebral lumbar procaine block was made and about six hours later"—

Mr. Angland: What was made?

A. A paravertebral lumbar procaine block, the same as this patient. "A paravertebral lumbar procaine block was made and about six hours later, vigorous arterial pulsations returned. The very moderate edema of the entire leg, which now appeared, persisted for some 10 days and was thought to be consistent with [436] a diagnosis of femoroiliac thrombosis. Curiously enough, there was improvement in the signs and symptoms referable to the colitis. 36 days after the onset of arterial spasm, a venogram was made of the left leg, Fig. 2, by the technique described." It describes the technique of injecting a radio opaque fluid into the vein in order to visualize the vein with X-rays.

(Testimony of C. H. Horst.)

“36 days after the onset of arterial spasm, a venogram was made of the left leg by the technique described.” Venogram, it means that that is a picture of the vein by means of an X-ray. “A tortuous outline of the injected fluid was seen in the upper two-thirds of the femoral vein, together with an unusual collateral circulation. These appearances were taken as evidence that thrombosis had, indeed, occupied the femoral vein, as previously believed, and that in the course of a little over five weeks had become fully canalized”—that is, a hole went through the clot, allowing the passage of blood.

Mr. Angland: How many days afterwards did you say that developed? Was it five weeks?

A. Yes, sir.

Mr. Angland: Five weeks later you had a canalization?

A. Yes, sir. I'll read it again. Here it is: “The appearances of this venogram was taken as evidence that thrombosis had, indeed, occupied the femoral vein, as previously believed, and that in the course of a little over five weeks had become fully canalized.” Now, then, of course, the picture of Mr. Hennessey [437] was very similar, except that Mr. Hennessey, besides having the pallor in his leg, had terrific pain, and it showed that you could have a contraction of the peripheral vessels in the arteries as well as in the veins, and it showed that this was definitely a thrombus in the vein. Now,

(Testimony of C. H. Horst.)

in Mr. Hennessey's case, he had nothing on the arterial side to show a reason for a thrombus; he didn't have any heart trouble; he didn't have any disease of the vessels, but he had a thrombus, and it was apparently, looking at it from the viewpoint of the arterial side, in the bifurcation of the aorta, so it was called a saddle clot, because one part of the clot went on the right iliac artery, and one in the left iliac artery, and the history showed that that is where it must have occurred because the pain started first in the right side and then in the left side, and then this disability immediately appeared, and the man became semiconscious, and his right leg turned white just as this occurred in this case, and then when they began to shoot this procaine in there and intervenous injections of procaine and narcotics to relieve pain, the pallor in his left leg was described by the doctors who had him in charge as going from the lower portion of the leg gradually down to the foot, then entirely disappearing. It showed there was a relaxation of the contracted arteries and that circulation was re-established. If the clot was in the arterial side, the symptoms would have been similar, because it would be the same [438] duplication of vessels; the vessels are duplicated, there is one aorta and one vena cava, which are very similar, and then they both divide into right and left iliac veins and right and left iliac arteries, all the way down the leg practically. There are more veins, usually, than arteries. So then it comes about regarding the

(Testimony of C. H. Horst.)

length of time that it takes a clot to form, and this boy, after his diarrhea, it was 87 days before the clot developed, so in Mr. Hennessey's case it was seven months, but the clots, they form gradually when they form in veins or arteries because of rents or tears in either of those vessels; and I showed the vein was more likely to tear than the artery because of the anatomical structure of veins.

Q. Postoperative clots, do they develop in a period of 15 days?

A. Yes; operations, you have a clot anywhere from seven to 12 days, and the clot is a very extensive one. Those clots are formed in large veins of the pelvis, and they are very soft and very large, and, usually, if they are from the vein, they go up into the lung, then through the pulmonary artery and form a big clot in each lung, and that stops the vital center, the respiratory center, the patient dies. I have a picture—where is that picture? This is a picture of a fatal case (indicating). It shows the clot, sir. That is the lung (indicating), and the pulmonary artery is opened and the clot is that red part, and these are clots that appeared in the veins. You [439] see, when venous blood goes up into the lung, it is carried into the lung by the pulmonary artery. When blood comes back from the lungs aerated, it comes back in those pulmonary veins. There is changes in the lung from veins to arteries and arteries to veins. To discuss clots that form following operations, patients when operated on

(Testimony of C. H. Horst.)

have very little leeway to get out of bed. Now the idea is switched around to get them out as soon as possible so the blood lying in these dilated veins in the pelvis, if it doesn't move, has a tendency to form clots, because in the operation the veins are inadvertently damaged by handling or retractors being put in, and for that reason, some clots form, and those are the clots that form postoperatively; but in this case, it is a formation of a clot in a vein, and it is a slow building up of those cells that I spoke of, the white corpuscles and plasmacytes, that keep building up within the interior of the veins until they become quite extensive, and then they have slipped as they have in Mr. Hennessey's case. Neither Mr. Hennessey, nor this boy had any symptoms whatever from these clots that were in the vein until they slipped and caused the pain in the legs and the pallor of the skin, and what else?

Q. Stopping of the pulsation?

A. And then the responses to the different sedatives that were used.

Q. Doctor, in connection with the testimony of one of the [440] witnesses for the United States, there was reference made to your testimony in which you accounted for some spinal cord damage, and which the witness testified that if a thrombus in the vein would go into, or would get into one of the smaller veins, that, instead of going into the spinal cord, it would go into that portion of the lower part of the spine which is, in English, called

(Testimony of C. H. Horst.)

the horse's tail, or cauda equina. I would like to have you explain your diagnosis of that as regards the method in which the vein, or the spinal cord would be damaged by a small thrombus, because of the fact you have testified Mr. Hennessey has evidence of spinal cord damage by reason of a spastic or other condition in his leg that still maintains. Could you demonstrate to the Court the complexity of that venal circulation in the spine to show that the clot does not go directly into what is called the horse's tail?

A. Well, yes, sir. The spinal cord is within the spinal canal made by the vertebral column and the loop that is formed by the lamina and spinous process, so the cord goes right through the spinal canal, and the cord is surrounded by the plexus of nerves, such as we brought here (indicating) to describe them. From each vertebra there comes a little vein that carries the blood into the general venous circulation, so that, if a person had a thrombus, for instances—these veins (indicating), the way this picture is, some of the veins drain the interior of the spinal vertebra, and some come in [441] through the intervertebral disks through which nerves come out from the spine. Here are the nerves (indicating), and they are accompanied by arteries and veins. This plexus of veins that surrounds the spinal cord has very many outlets, as you see, so if this little vein would become occluded, the blood would go up and come out. You could have a whole

(Testimony of C. H. Horst.)

series of thrombosed veins coming out from the interior of the spinal canal and still circulation could be established, because of the complexity of the arrangement of those veins that surround that; so, you see, by taking one individual vessel and stating that it is over the third vertebra, below the location of the spinal cord, doesn't mean anything, because you could tie any number of those off and collateral circulation could be established, so that point doesn't mean anything. The point about this case as regards the nervous system is the terrific convulsions and spasms that this man had for days when he was in bed, which required an elaborate amount of sedatives to control, and that showed that the brain that controls the lower motor neurons, the tracts that go from the brain to control the lower motor neurons were not working, because those impulses that came from the feet and legs there went up into the spinal cord, were not inhibited, and were allowed to go at random, and the result was these spasms occurred. If they were controlled by the pyramidal tract, the spasms would not have occurred as they did, so, therefore, there is some obstruction in the spinal cord, and [442] the spinal cord is made up of gray and white matter, and in case——

Mr. Angland: Just a minute, your Honor. I think the doctor is drifting now. I am going to object to him going into what he is going in now, as drifting into a theory completely at variance

(Testimony of C. H. Horst.)

with the former testimony. He is talking about damage to the spinal cord not arising out of an embolus at all; he is drifting clear out of that, and, of course, the pleadings in this case restrict their proof on that, and, of course, their case in chief is based upon the pleadings and damage resulting from embolus.

The Court: Objection is overruled; proceed.

A. Now, the spinal cord is made up of gray matter and white matter, and in the gray matter are all these special cells that control the muscles and control the blood vessels, so, for instance, take infantile paralysis, there the cells in the anterior horn of the gray matter are destroyed, and the consequence is that the leg below withers and is not able to be used if there is a complete destruction of the connection of the nerves. If there is a partial connection, certain muscles have escaped by reason of their anterior horn cells not being destroyed, and certain muscles in that leg will be voluntarily moved. In other words, when there is an interruption of the lower motor neurons, paralysis occurs; if there is a disconnection between the upper motor neurons, there is a spasticity, [443] there is hyperactivity of all the muscles of the leg, and these sensory impulses that come up from the leg are uncontrolled, and, therefore, this condition that Mr. Hennessey suffered from develops. This circulation that I described as being around the spinal cord goes all up and down the spinal cord,

(Testimony of C. H. Horst.)

it comes from the cervical region, dorsal region, lumbar region, and sacro region, and goes entirely up and down the cord, because while the spinal cord stops at the lower border of the first lumbar vertebra, the membranes that cover the cord, the dura mater and arachnoid membranes and the pia membranes, all have to be supplied with blood, so that complex system of veins is from the beginning of the cervical cord down through coccyx, it is present all the way, so that allows a very liberal method of transferring blood from one place to the other, and if the veins that I described here as coming out from the vena cava were occluded by reason of a clot within it, if that lumbar vein was occluded and went down, it could start emboli of various sizes, small emboli and large ones, into the plexus around the spinal cord, and that could lead into the gray matter of the spinal cord and cause a disturbance of the tracts, the nerve tracts, that control the leg.

Mr. Doepker: At this time, your Honor, we desire to make an offer of proof in connection with deep venous thrombosis in the leg following effort or strain, and in response to your Honor's questions that were propounded to Dr. Horst at Billings [444] as to case histories besides the one that he had with him at that time, we offer his testimony in connection with a research that was made by Dr. Chilton Crane from the Department of Hygiene, Harvard University, and Department of

(Testimony of C. H. Horst.)

Surgery, Peter Bent Brigham Hospital, who is a clinical associate in surgery, Harvard Medical School, and associate in surgery at Peter Bent Brigham Hospital, in Boston, for the purpose of illustrating reported cases from a period starting in 1930, up to April of 1952.

The Court: And what is the purpose, to show that it is possible for the vena cava——

Mr. Doepker: No, your Honor, it is to show similar cases that have occurred besides the one that he testified to there of the athlete. He has ten.

The Court: Was your former opinion based upon a study of these cases?

The Witness: Those particular cases?

The Court: Yes.

The Witness: No, they weren't available; no, I didn't have them.

The Court: I don't understand the purpose.

Mr. Doepker: Your Honor, the purpose of this is to substantiate the diagnosis.

The Court: This is not rebuttal then?

Mr. Doepker: No, that is the reason we are making an [445] offer of proof at this time.

The Court: You want to ask leave to reopen to introduce this?

Mr. Doepker: That's right.

The Court: I'll tell you, I would like to have it in, except surely the Government is entitled to have these analyzed and another doctor, with maybe a different view, testify. Maybe there could be no other view, I don't know.

(Testimony of C. H. Horst.)

Mr. Doepker: The only thing these are, your Honor, are medical histories which we would put in the same category as authorities we would pick out of the Pacific Reporter.

The Court: Yes, but whatever it is, it comes at a point when you have closed your case in chief. As I say, the cases may be of interest and help actually, but, on the other hand, the Government is certainly entitled to have the cases analyzed and explained to the Court, and they are just not in a position to do that.

Mr. Doepker: We would be willing to stipulate if the Government wished to examine those and to submit surrebuttal on their case; they could furnish it in the form of a statement by their doctor, or any doctor they choose to see, if there is any difference between the two.

Mr. Angland: I am not in a position to make a momentary decision on that. I haven't had an opportunity to study that over or know what it is about.

The Court: You wouldn't know what it is about after you had [446] studied it.

Mr. Angland: No, I would have to sit down with a doctor to find out what it is about. I did that with respect to the example Dr. Horst based his opinion on, and our medical evidence was to the effect it wasn't a similar situation.

The Witness: Judge, may I show you the place?

The Court: Wait a minute. Well, of course,

(Testimony of C. H. Horst.)

this article deals with thrombosis in the leg.

Mr. Doepker: Yes, and the source is also shown in those tables as either the branches of the veins or the vena cava itself.

The Witness: Your Honor, it shows a collection there of cases very similar to Mr. Hennessey's. There are 10 of them there, did you see that?

The Court: Yes, it lists that.

The Witness: You see, after he had described thrombosis in the legs from minor injuries, then he goes in and studies the literature from 1930 to the present time for thrombi that appeared in deep veins.

The Court: I don't know. You see, the difficulty of this thing, without assistance of other doctors, I just see the statement like an exhibit, and the cited cause is usually from minor injuries or strain to the lower leg and foot. That is what he is talking about in those cases.

Mr. Doepker: That's right, that particular article deals [447] with the lower leg and foot, but the illustrations we are offering deal with thrombosis in higher arteries and veins that result in damage to the lower leg.

Mr. Angland: That is a very different case than Dr. Horst made in Billings in his testimony in chief. Thrombosis in the lower leg is a quite different case.

The Court: What is the real purpose of this now? It may be you are trying to prove something everybody will admit; I don't know.

(Testimony of C. H. Horst.)

Mr. Doepker: The purpose is to show case histories similar to the case we are considering here, where a thrombus did occur in the upper, in the higher deep veins, and there is two instances there where they attribute it to a thrombus in the vena cava in those examples, and the thrombus fell off and went down into the lower leg. The damage in the lower leg——

Mr. Angland: Dr. Horst's story is that it broke off and fell into the lower leg, down the vena cava. That is the theory in his testimony in chief. If he has a supporting case for that specific situation that he described——

The Court: Does this have anything to do with a case in which there is a thrombus in the vena cava and a dropping off of the emboli into the lower leg?

Mr. Doepker: I don't know whether they do or not. Have you made a study about that?

The Witness: No; it doesn't say anything about that. [448]

The Court: That is Dr. Horst's testimony in this case.

Mr. Doepker: That's right.

The Court: If those cases aren't of that nature, are they of any materiality? I'll tell you what I am going to do. I will overrule any objections you have and accept it into evidence, and I'll tell you, if the cases strike me, in the light of the whole evidence, of being of value, I'll call it to the Govern-

(Testimony of C. H. Horst.)

ment's attention and give the Government an opportunity to protect itself. I don't know what good any history is going to do except one that shows me that in line with the doctor's theory of the case, that there was a thrombus in the vena cava and an embolus broke broke off and sank to the leg. That would be the only history that I offhand think would be of any importance.

Mr. Angland: A thrombus caused from a similar situation, delayed action for seven months, dropping from the vena cava into the lower leg. That is the case the doctor made in his case in chief.

The Court: That is the case the doctor made in his case in chief.

Mr. Angland: If this evidence has any value, it will have to be based on that.

The Witness: No; this Dr. Crane——

The Court: I'll tell you, I don't need any further discussion on this. [449]

Mr. Doepker: No.

The Witness: This doctor——

Mr. Angland: I am going to object to him going further. Your Honor has admitted the document.

The Court: I have admitted it for the purpose of illustrative cases, and I will look them over, and if they appeal to me as having weight in this case, then I will advise the Government, so the Government can have an opportunity to present some discussion on the thing. Otherwise, we are just going into a whole new line of testimony here.

Mr. Angland: We are going into an entirely

(Testimony of C. H. Horst.)

different theory if we adopt something else, trying a different lawsuit than we started out to try.

Mr. Doepker: For the record, then, we are offering an article in the New England Journal of Medicine, entitled, "Deep Venous Thrombosis in the Leg Following Effort or Strain," and particularly in that article a table on page 531 listing 10 cases of deep venous thrombosis in the leg following uncomplicated effort or strain, as reported in the literature since 1930.

Mr. Angland: Certainly, your Honor, that goes in subject to our objection.

The Court: Yes, I will receive it in evidence subject to the opportunity of the Government to explain or otherwise further object to it. [450]

(Article in The New England Journal of Medicine, dated April 3, 1952, entitled, "Deep Venous Thrombosis in the Leg Following Effort or Strain," was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Mr. Doepker: You may inquire.

Cross-Examination

By Mr. Angland:

Q. Dr. Horst, a few minutes ago, you compared, I believe, Mr. Hennessey's condition to infantile paralysis, is that right? A. That's right.

Q. What is the nature of infantile paralysis, the

(Testimony of C. H. Horst.)

disease itself?

A. Well, the disease, the etiological factor is not known, but the pathology is known. Those anterior horn cells in the cords that supply the muscles of the legs, or lower motor neurons, they call them, and when they are attacked by the factor that causes this disease and destroyed, in consequence the muscles that they enervate die.

Q. That is the situation in infantile paralysis or polio, it is a disease or destruction of the muscles, isn't it? It is actually a destruction of the muscular system, isn't it, Doctor?

A. It is primarily in the nervous tissue because the nerve cell is the first to be destroyed.

Q. Actually, Doctor, there is no sensory change in infantile [451] paralysis, is there? There is actually no sensory change, is there? Answer that question.

A. Some cases do have pain, yes.

Q. In infantile paralysis?

A. Yes, some cases have pain.

Q. How many cases have you treated, Doctor, and found sensory change?

A. I don't know; I would say there would be change.

Q. Have you ever treated a case of infantile paralysis in which you found a sensory change?

A. No, I haven't had very much to do with that.

Q. Have you had anything to do with it?

A. I have seen cases, yes.

Q. Have you seen sensory changes, Doctor?

A. I say this about the sensory changes, sir, that

(Testimony of C. H. Horst.)

there are sensory changes in these cases that do suffer pain. When they suffer pain, they do have sensory changes.

Q. What cases are you talking about?

A. Infantile paralysis. In this case I am talking about sensory changes.

Q. How many cases of infantile paralysis have you treated? A. None.

Q. None; very well. Doctor, you don't know, then, you haven't treated a patient for infantile paralysis, so you haven't actually determined whether there are sensory changes [452] in infantile paralysis?

A. No, but I do know they feel, do suffer quite a number of times.

Q. There isn't any question about them suffering?

A. If they suffer, they have sensory change. That sensory change is pain.

Q. How did you test Mr. Hennessey's sensory changes, with a needle and so forth, on the bottom of his foot?

A. I did that. I tested it with a pin, and with a little cotton wrapped on a stick. I went up and down his leg. He could feel.

Q. You found it very sensitive?

A. The point with Mr. Hennessey and with this case is that there are sensory nerves, which you will find it in my testimony, associated with blood vessels besides dilator and contractor nerves, and

(Testimony of C. H. Horst.)

I would like to read that thing to you about sensory nerves in blood vessels. That has been contested in former years, and it is only now that they are beginning to find out there are pain nerves associated with blood vessels besides dilator and contractor nerves.

Q. Dr. Horst, what your position is is that there was an effect on the spinal cord and circulatory system as it went back to the spine below the second lumbar region, is that right?

A. Oh, no, that is your theory. I said that the clot, it was in the vena cava, and that it was—I measured it to [453] you—approximately where perhaps the fourth lumbar vein comes off the vena cava. Then you come along and say in the spinal cord, in the spinal column. Suppose these veins that I designated, that there were only nerves that came down from the spinal cord; in other words, that those nerves here in the cauda equina——

Q. There is a nerve cord coming down there?

A. I don't know what you call them. I call them nerves, you call them cords. Let's call them nerve cords.

Q. Is there one nerve?

A. Various nerves, various segments.

Q. That is the way it leaves the end of the spinal cord and forms what is known as the horse's tail?

A. Cauda equina, yes, sir.

Q. That is a group of nerve cords, isn't it, each containing multiple nerves?

(Testimony of C. H. Horst.)

A. That's right, they contain multiple nerves because they come from different segments in the cord.

Q. Each one of those cords, as it comes down the cord, doesn't go, say, to the foot, you don't have a cord come out and go right straight down to the foot?

A. No.

Q. You have those nerves from that cord winding around the upper part of the body, and you will find the same nerves, possibly at the buttocks and at the foot, coming out of the same [454] cord?

A. Yes, that's right.

Q. And it will wind around?

A. Yes.

Q. So that if you have a blood vessel leading from the vena cava to one of those nerves or nerve cords, it then will effect every portion of that lower part of the body where that nerve cord leads the nerves, wouldn't it?

A. No, because that is a composite nerve, it is made up of many nerves, isn't it, so some of those nerves that come out, they come out from the third, fourth, or fifth spinal segments, so if you would take a nerve that came out of the fifth segment, or the fourth segment, or the third segment, supplying the nerves in the buttocks, and another nerve supplying it down below, those nerves would not have the same origin.

Q. Does the blood returning into the veins leading into the vena cava run from each nerve in the cord?

A. They accompany the nerves as they leave the

(Testimony of C. H. Horst.)

cord. There is an artery and vein that accompanies each nerve, yes. They go through, the nerves and arteries and veins go through the intervertebral disks.

Q. Is there any nerve in that horse's tail, as you call it, that would go right from one of those nerve trunks right down to the left foot; is there any nerve in there that would do that? [455]

A. I was just trying to think. Yes, there are nerves that supply the small muscles of the foot that have their origin in the lower portion of the spinal cord.

Q. Yes, but they also affect other portions of the body above that foot, they don't just run from the nerve cord down right straight down to the bottom of the foot, do they?

A. They are complex nerves. Some branch off and supply muscles above, others go down and supply muscles in the thigh.

Q. You have got an Anatomy book here, Doctor. I presume you can find just how the nerve trunks leave the spinal column, and how they wind around the lower extremities. Can't you find that diagram in that book?

A. Didn't you bring that book with you, Doecker? I never thought it would be brought up. I have a very excellent chart which is like that (indicating chart) with the nerves. I didn't bring it up.

(Testimony of C. H. Horst.)

Q. Yes, I had a good book in Billings I borrowed from Dr. Allard, but I don't have it now.

The Witness: Your Honor, could we have a recess until I brought that chart up?

Mr. Angland: I can go into something else.

The Court: We can take a short recess now, but how long is this going on?

Mr. Angland: I hope not very long. I don't want to unduly delay the matter. I think your Honor will recall that [456] Dr. Allard had with him when he testified a chart of the course of the nerve trunks and nerves as they leave the so-called horse's tail, and I just want to clarify that problem. The doctor, I think, has left a wrong impression in the record on it.

The Court: Court will stand in recess until 20 minutes after 11. Maybe you can find a chart in there that will satisfy your needs at this time.

(10-minute recess.)

Q. (By Mr. Angland): Doctor, I think you stated during the recess that we have been talking about two different things. Maybe we can get together and talk about the same thing for awhile. Your testimony is to the effect that the damage to Mr. Hennessey was in the vena cava, is that right?

A. That's right, and that is a blood vessel.

Q. That is a blood vessel with the blood flowing up into the heart?

A. That's right.

Q. You testified that there was further damage to the small blood vessels leading from the spine, is that right?

(Testimony of C. H. Horst.)

A. I testified that there was also damage to the spinal cord which was produced by emboli that came through those small vessels that supply the spinal cord.

Q. Those emboli came from the vena cava?

A. From the vena cava, that would be the origin of them. [457]

Q. And flowed into the small veins leading into the spine?

A. Then the emboli got into the circulation of the spinal cord, and not of the cauda equina, of the spinal cord.

Q. The damage, according to you, was above the second lumbar region? A. Yes, sir.

Q. It was not below the second lumbar region?

A. No, sir.

Q. Can you point out on this diagram, this chart you have, approximately where the second lumbar region is, approximately?

A. You see, this is the fifth lumbar vertebra, so this would be about the fourth, third, second, and first, it would be about there (indicating).

Q. Then you are now testifying that there was damage above that point in the vena cava?

A. I am now testifying that the nerves that supply the muscles of the leg and have their origin in the gray matter of the spinal cord were destroyed by emboli that formed and found their way into the gray matter of the spinal cord.

Q. From the vena cava?

(Testimony of C. H. Horst.)

A. From the vena cava, that would be the origin of the emboli.

Q. In each instance, then, for the emboli to do that, they had to flow against the stream of the blood, didn't they? A. As I pointed out—

Q. Before you go any further, isn't that the fact? [458] A. Yes, that is the fact.

Q. They would have to flow against the flow of blood?

A. There is another factor in there, that this clot covered the openings of the veins that return to the vena cava from the spinal cord.

Mr. Angland: And let the record show that he is pointing to a region below what he has designated as the second lumbar region.

The Court: Very well. Now proceed.

A. So that the clot, before it moved, had occluded the opening of these small veins into the vena cava, and that in all likelihood the thrombus went into these veins as well, so that when there was a dislocation of the clot into the iliac veins, that tore loose from its attachment to the wall of the vena cava, and in this disturbance, those clots in that vein got in this complex venous plexus that surrounds the spinal cord and got into the gray matter of the spinal cord and destroyed some of the anterior horn cells. There was an awful commotion there in the nerve elements of the spinal cord that allowed all these spasms to occur, and the reaction of such physiological activity would cause

(Testimony of C. H. Horst.)

suffering likewise of the vessels within the cord, and that is how the destruction of these cells took place.

Q. Now, Dr. Horst—just have the stand there—the fact is that this venous structure, is that what you call it? [459]

A. You can call it structure.

Q. —that you are referring to as having been partially occluded and later receiving some of these emboli were portions of the venous structure that refer to the nerve trunks after they had left the spinal cord, rather than to the spinal cord itself?

A. The trunks would not be involved in a thrombus. A thrombus forms in a vessel. The nerves that come down wouldn't be affected at all, even if there was a big clot in that spinal cord.

The Court: Isn't this cross-examination, counsel, directed to the witness' direct testimony?

Mr. Angland: No; it is connected to this rebuttal, your Honor. He went into the matter on rebuttal.

The Court: Yes.

Mr. Angland: And he had a diagram of the circulatory system all down the spinal cord, and referred to the whole venous structure along the whole spinal cord. I am trying to find out, your Honor, just what the doctor means by that, because it appears to be inconsistent with his direct testimony. He is now talking about damage above the second lumbar region where the spinal cord termi-

(Testimony of C. H. Horst.)

nates. His testimony on direct, as my memory serves, was damage in the vena cava below the second lumbar region, and now it affects either the nerve trunks or the spinal cord above, and I am trying to get at the circulatory [460] system below the spinal cord.

The Court: Very well.

A. Now, I will tell you, if you can understand that there is a plexus of veins that surrounds the spinal cord from the base of the brain to the coccyx. It doesn't make any difference where that plexus is entered by a thrombus, it won't be cut off, it will circulate in so many ways that nobody could tell where it would lodge unless they considered the damage that occurred from the lodging of the embolus, so that I claim that this leg has been affected because the nerve cells that supply the nerves that supply the muscles of the leg have been destroyed, some of them have, not all of them. That is why that foot is in a state of spasticity. That is why that man cannot extend his foot, but it is continually in a state of spasm, and that spasticity is due to the fact that sensory impulses coming from the damaged leg that go to the cord are not inhibited by the brain which connects to the tract, nerve fibers, called upper neurons.

Q. Let me interrupt you at this point, Doctor; we are going to drift a little too far here if we don't break this down a little. We would like to finish it some time. Doctor, referring back to your direct

(Testimony of C. H. Horst.)

examination, my memory of that is that you said there was a thrombus that formed in the lower portion here of the vena cava before it divided, so to speak? A. No, I didn't. [461]

Q. You didn't have any idea of a thrombus forming in the vena cava?

A. I said a thrombus formed, and I explained how the pressure came down. It met here at the termination of the vena cava, and it went on each side; because it was such a terrific force, it also split the intima of these veins, the vena cava and the right and left iliac veins. Those clots gradually spread out like a saddle; then when that slipped down; then when that slipped down—this was my idea of the formation of the clot and how it got into the spinal cord. It has to get in there through veins or arteries, it has to get there through the veins, and that clot, it was presumed that that clot went right back into the plexus of veins surrounding the spinal cord. Therefore, no matter where you try to figure out it entered, clots could go up or down. They seem to have chosen the anterior gray matter.

Q. Now, is it your testimony that there were numerous clots?

A. No, I don't know how many clots there were. My theory was, it was my contention, and it is now, that the interior of the vena cava and the vessels going off from it, namely, the right and left iliac veins, were distended excessively when this man

(Testimony of C. H. Horst.)

fell on him, and those little rents in the intima caused thromboplastin to come out, and I explained how clots form, and after that, those clots kept building up, building up, until they encroached on all the area contused or injured. [462]

Q. You are not telling us that on June 2nd, 1949, numerous clots of blood formed in here, and they just floated up and down the vena cava and into the other veins?

A. They could have done that, but my idea is they didn't. I didn't say anything about clots moving up and down. I told you the intima was injured; after it was injured, then the process of forming clots began.

Q. The thrombus began to form, isn't that what began to form?

A. Yes, what is a thrombus? What do you talk about, a thrombus?

Q. I don't know.

A. Just a minute, you can't talk about it and not be able to define it. That is the reason we don't get along.

The Court: Doctor, you have to realize that counsel doesn't have to define it. He can ask you. You don't have to accept his understanding, in any event, if he could explain it to you.

A. Thank you, sir. The vena cava and the right and left iliac veins, when this fall hit Mr. Hennessey, this man hit him, it went split, made little splits in the intima, or general contusions. Then

(Testimony of C. H. Horst.)

thromboplastin poured out from those cells, and the cells that were in the blood began to seal these places up by deposition in the walls of a vein, and that is a thrombus. [463]

Q. Now, Doctor, your point now is that there were numerous thrombi developed in the vena cava?

A. If you want to have each crack and each contusion a thrombus, then there were numerous thrombi. There couldn't be anything else. There was a contusion of the lower portion of the venous tree.

Q. Doctor, just so we will understand what your testimony is here, if it isn't your idea that there were numerous thrombi developed in the lower part of the vena cava and the right and left iliac veins, if there weren't numerous thrombi in there, is it your idea and testimony that there was one large thrombus developed?

A. No. I will explain it once more.

Q. There has got to be one or more.

A. There were multiple lesions within the vena cava and the right and left iliac veins.

Q. Let me stop you right there——

A. There are multiple lesions, so the blood deposited multiple clots. Now, those are so close together they finally fuse.

Q. They finally fuse? A. Yes.

Q. Is it your opinion they fused in Mr. Hennessey's case? A. Yes.

Q. They fused in Mr. Hennessey's case?

A. They couldn't help it. [464]

(Testimony of C. H. Horst.)

Q. When do you think that that large thrombus developed, after they had fused and became one large thrombus? A. Yes, sir.

Q. When do you think they exploded so you had various clots floating around in the upper part of the vena cava?

A. You said they were floating around.

Q. You have some of them up here in the area above the second lumbar region going into the small veins leading into the spinal cord.

A. You are talking about the spinal cord and clots. Keep it confined to the clots. Ask me about the clots, please?

Q. What happened to this large thrombus that developed in the vena cava?

A. When Mr. Hennessey got out of bed on that fatal day in the hospital and he got a pain in his right leg, that was the time that the clot dislocated and went down into his right iliac vein. Then, when he was assured by the nurse that all was well, he returned and it went down into his left iliac vein, so, therefore, the veins that emptied into the clot, that were in my opinion occluded by the clot, were disturbed because they were, I think, attached to the clot.

Q. When did the clots you spoke of a few minutes ago go into the small veins leading from the spinal cord to the vena cava, when did those small clots go into those veins?

A. The clots—I assume that the veins that led

(Testimony of C. H. Horst.)

into the vena [465] cava that were occluded by the clot couldn't work because there was no exit for them, so the blood backed up.

Q. There was an occlusion then?

A. It had to be occluded. The little veins going into the vena cava couldn't go in because the clot occluded them, so when the clot slipped, that clot that was in the small vein could have been cut off and could have been loosened up, and it could have got into the circulation that surrounds the spinal cord.

Q. In the portion of the spinal cord above the second lumbar region?

A. Yes, it doesn't make any difference.

Q. It could have gotten up there.

A. The plexus is so complex that anything that got within that plexus of veins could land anywhere.

Q. In that plexus of veins?

A. Yes, there was nothing to obstruct it.

Q. Just a minute——

The Court: One at a time. When counsel is asking a question and when the doctor is putting in his answer to the question, don't stop him. Let him make a complete answer.

Mr. Angland: I was trying to shorten it so we wouldn't lose our train of thought.

The Court: It takes more time interrupting so we don't know what is going on, so one at a [466] time.

(Testimony of C. H. Horst.)

Q. Wouldn't the plexus of veins all drain into the vena cava, isn't that right?

A. Eventually they do, yes, those up above drain into the superior vena cava and those from the lower drain into the lower vena cava, yes, that's right, and then there are accessory veins, they call them azygos veins, that help out to drain the portion of the chest where the heart is, and they finally go up and finally terminate into the vena cava.

Q. Did you find in the hospital records of Mr. Hennessey that any of these clots you are speaking of went up the vena cava and deposited in the heart or lungs?

A. You would put—no.

Q. Is there anything in the chart to indicate that happened?

A. No, there is nothing in the chart to indicate the emboli went up and down the vena cava or up and down the aorta, but there is in the chart a paralysis of these legs and uncontrollable development of spasms in the leg. That is there, that has to be explained. Why does that do that? Why does he have a flexed foot? That is the thing we are trying to explain with these emboli.

Q. Doctor, you read from a book a few minutes ago about a young boy, I believe you said he was 17 years of age?

A. Yes, sir.

Q. And I think you said that 87 days after he was admitted to the hospital for what was diagnosed as mucous colitis, then [467] he developed symptoms of an embolus?

(Testimony of C. H. Horst.)

A. Yes, the symptoms were very similar to Mr. Hennessey's symptoms. They came like that.

Q. Did Mr. Hennessey have any mucous colitis?

A. No.

Q. That wasn't present?

A. That wasn't the purpose of exhibiting this case at all. This case was exhibited to show that in the case of an embolus of either vein or—in this case, of a vein, that the leg would be white, that there wouldn't be any pulsation in it, you couldn't find the artery beat in his foot, popliteal space, or in his groin, and the other factor in relation to Mr. Hennessey was that it didn't occur until at least 81 days after the mucous colitis had subsided. We are making the point that that case was proven to be a clot in the venous side and not in the arterial side, and that it has contractions of the peripheral vessels in the foot and it had no pulsations in the arteries, and those are the very points you make in your diagnosis of thrombosis on the arterial side, so they were also present when the thrombosis was on the venous side.

Q. That was a thrombus that developed in the lower leg?

A. Yes, and it was proven by X-ray that it was in the venous side.

Q. Did that tell you in that story what caused the thrombus?

A. No, but I explained that, and that is what everybody has [468] to go back to. Why don't blood clot in our veins, in our arteries or our veins?

(Testimony of C. H. Horst.)

Q. Was there anything in that medical history of that case to show injury to the 17-year old boy?

A. No, I don't find that at all. It did show this: There was no pulsations in the peripheral vessels of the leg, and the leg was pallid, and it pointed out specifically that the doctor said there was a venous thrombus in his opinion, so the other doctors went on to prove it, and they did.

Q. In that case they pointed out the development of an unusual collateral circulatory system, didn't they?

A. That's right.

Q. Did you find in Mr. Hennessey's case an unusual collateral circulatory system built up?

A. How could I? I didn't inject any dye into his venous system. That unusual collateral circulation system developed in this picture was the result of roentgenological examination. No one could tell the collateral circulation from inspection.

Q. You could if the thrombus is in the vena cava and you have an occlusion there, you can tell?

A. You can do it by referring to the diagrams in the book to see which way the collateral circulation was established, but you can't tell which way it went. There is a number of ways in collateral circulation that the blood may go around the point of obstruction. [469]

Q. What I am getting at, Doctor, in this case, you had a thrombus in the lower leg?

A. Yes.

Q. And there was an unusual collateral circulatory system built up. In Mr. Hennessey's case, you

(Testimony of C. H. Horst.)

had a thrombus that developed in the vena cava?

A. Yes.

Q. Now, the collateral circulatory system that would build up there is one that would be on the surface of the abdomen?

A. It would be on the pelvis, yes.

Q. And would be obvious to the naked eye?

A. In the pelvis?

Q. Down on the abdomen?

A. There might be some superficial veins dilated in the pelvis. The only way you could show that would be injecting dye into the venous system and study the roentgenrams developed from it.

Q. Doctor Horst, if you had an occlusion of the vena cava and a collateral system builds up, it would develop veins on the surface of the abdomen?

A. It would develop a few veins, but not very many, it wouldn't tell you a thing about the collateral circulation. It wouldn't tell you which veins were occupied in developing collateral circulation.

Q. You wouldn't have veins on the abdomen more obvious than [470] those on the back of my hand?

A. You might have.

Q. If I have a thrombus in my vena cava that causes an occlusion, it will develop the veins on the surface of the abdominal walls, the surface of the abdomen, so they will be more pronounced and more obvious than are the veins on the back of the hand, isn't that true, Doctor, that would be your collateral circulation?

(Testimony of C. H. Horst.)

A. That would be part of your collateral circulation; that would be the peripheral part, but the main part would be in the pelvic veins. It would have some on the surface, yes.

Q. Quite a lot?

A. There is only one vein, there is two veins, one that comes down from the chest, and one from the abdomen, the epigastric veins would be dilated; there would be signs there was collateral circulation building, but if you had that, you wouldn't know where the clot was unless you have evidence such as we have in this case.

Q. When you have a collateral circulatory system building up, you think you have a thrombus, don't you?

A. That would indicate it, yes, that is why it is built up. The blood tries to find a new way so it goes around that obstruction.

Q. So that is what they found in the case you read from?

A. Yes, sir, that's right. [471]

Q. And in Mr. Hennessey's case, did you find the collateral system building up at all, or is there anything in the hospital records to show that Dr. Stokoe found that condition when he was treating Mr. Hennessey in the hospital?

A. No, he didn't find it. Why didn't he find it? Because he was entirely engaged in relieving this man's pain. He couldn't feel a pulse in **any part** of the leg, so he assumed that it was an arterial occlusion. Then I came along, and I don't find anything in the arterial system to warrant formation

(Testimony of C. H. Horst.)

of a clot, but I do find it in the venous side, and I have explained that so many times how that clot forms on the venous side, and I have also told you that clots on the arterial side usually throw the clot into the brain or into the kidney, or anywhere, but venous clots are thrown up into the lung, but this clot was so heavy it didn't go up, and it slipped down, and that is why Mr. Hennessey has this condition, and he has pain in his leg all the time, and I think it would be very appropos to inject his veins and take roentgenograms of it, and you would see where the clots were, because certainly lots of clots are still present in his venous system.

Q. Doctor, in this case history you read from, you referred to canalization developing there after he had been in the hospital for five weeks, is that right?

A. That's right.

Q. Is it your idea that canalization developed in Mr. [472] Hennessey's thrombus?

A. Yes, it could be canalized. When I was describing this clot in Billings, I said the blood could go around the side of the clot. It was my idea it went around the side in the vena cava, that it went around the side of the vena cava, but it went through the vena cava, which is nature's way of making a hole through a clot, that is canalization, then it could be canalized. I don't say it couldn't be.

Q. Is it your idea it was canalized in Mr. Hennessey's case?

A. If canalization means a canal through the

(Testimony of C. H. Horst.)

clot, that is all supposition, but this I do know? That the blood did go around the clot.

Q. I would like you to answer my question, Doctor.

A. Well, a canalization, it could have been canalized.

Q. It could have been in Mr. Hennessey's case?

A. Yes, sir, and when it slipped down, it could have occluded the canalization there and obstructed it. The canalization could have gone down through the main clot of the vena cava and could have been continued through each of the iliac veins.

Q. Before you develop canalization, you have a complete occlusion?

A. No, we have said he didn't have it. You could have it, and if you did have, you would have gangrene.

Q. You would have considerable swelling? [473]

A. If you didn't have some way for the blood to get back, you would have gangrene, and if the blood had acted as it usually does in a vein, it would have gone up to the lung and you would have a pulmonary thrombosis there.

Q. Doctor, before you develop canalization, the thrombus grows and grows until it reaches the point, until it is closing off the vena cava, isn't that right?

A. That would be right if it did close, but there is nothing to show it ever did close.

Q. Well, after that happens, and about the time it closes off, you begin to develop your canalization?

(Testimony of C. H. Horst.)

A. That's right.

Q. That is a canal right through the thrombus?

A. That's right.

Q. And during that time you develop these collateral circulatory systems, don't you?

A. That's right.

Q. You also when you have that occluding of the vena cava would have a swelling of the lower extremities, wouldn't you?

A. If the collateral circulation was inadequate, you would have swelling, but if it were not, if the canalization was adequate to meet with the flow of blood, you wouldn't have swelling. If the canalization was inadequate, you would have swelling of the leg because it would dam the blood back on the foot. [474]

Q. You don't have canalization until you close it off, until the blood develops a new canal through there?

A. I don't think there is anything to show there was a complete obstruction of the vein. The man never suffered one bit of swelling of his leg before this thing happened, but he had a clot in there, so how do you explain that, except that the blood must have gotten around alongside of the clot or by canalization.

Q. In Mr. Hennessey's case?

A. In Mr. Hennessey's case. He didn't have a thing to indicate he had anything wrong with his leg.

(Testimony of C. H. Horst.)

show whether the embolus was in the vein or the artery?

A. Well, the patient was treated for an embolus which might be either in the artery——

The Court: Let's just get to the question. He said what would the symptoms be that would differentiate an arterial embolus from a venal embolus after the 36-hour period?

A. There wouldn't be any symptoms at all; there wouldn't be any new symptoms, but the symptoms or signs of pulseless [477] vessels would change, because they would have to be present, or the patient would die, and, therefore, if it was on the arterial side, gangrene would develop, and so that would develop on the venous side. Now, as they who were treating it described it, there was a line of demarcation in the lower part of the leg, it was white, and as time went on, the line of demarcation spread downwards. Finally, within 24 or 36 hours, the whiteness had disappeared entirely, but the pain didn't disappear, but the line of demarcation did, and pulsation came back in the leg.

Q. Doctor, I am trying to find out what the symptoms would be, what a doctor would notice and observe at the end of the 36-hour period. The symptoms, you said, are the same, and you set your maximum at 36 hours that they would remain the same. What precisely would be the symptoms to demonstrate to a doctor that the embolus would be in a vein or an artery?

A. There wouldn't be any difference because both would be the same. The only way a doctor

(Testimony of C. H. Horst.)

could differentiate between the arterial and venous system would be X-ray and the study of his history. The history of this case shows the arterial side was devoid of any possibility of thrombosis.

Q. The statement in the case history you read to first from a thrombus in the vena cava or aorta, the effect that the symptoms would be the same at actually "at first" is superfluous? The symptoms would be the same; you would not be able to tell the [478] difference.

Mr. Doepker: I object to the form of that question. This doesn't relate to a comparison of the symptoms at first.

The Court: The doctor did.

Mr. Angland: The doctor did, I am sure. He said the symptoms at first would be the same in the vena cava or aorta. I am trying to find out what "at first" means. I am trying to demonstrate what the symptoms are——

The Court: The doctor has now said there wouldn't be any symptoms that would differentiate between a vena cava and an arterial thrombus.

Mr. Angland: If that is the doctor's answer, all right.

The Court: That is as I understand.

The Witness: That is it; I am talking about the beginning, or the onset of the thrombi.

Mr. Angland: That is all.

Mr. Doepker: I don't have any.

The Court: That is all, Doctor.

(Witness Excused.) [479]

Q. I now present to you, Mr. Wheeler, Plaintiff's proposed Exhibit 23, and ask you whether that is the identical copy of the original account? [303]

A. It is.

Mr. Doepker: We offer in evidence this exhibit.

Mr. Angland: That is all.

The Court: Admitted.

PLAINTIFF'S EXHIBIT 23

"Billings Deaconess Hospital, Billings, Mont.

Date: 1-3 1950. Hour: 8:10 P.M. Room: 208. Rate:

Physician: Stokoe. Case No.

Patient: Hennessey, Joseph P. Age: 32. Sex: M. Nationality:

S(MW)D.....

Home Address: 1221 Grand Ave., Billings, Montana. How Long:

Phone: 7827. Date of Birth: Jan. 17, 1917. Place: Montana.

Employer: Position: Dept.:

Medical: X. Surgical: Obstetrical: Pediatrics:

Emergency:

No. of Dependent Children:

Relatives, Nearest: Mrs. Geraldine. Address: Same. Phone:

How Related: Wife.

Father's Name: Edwin D. Address: Deceased. Birthplace: N. York

Mother's Maiden Name: Mary Lenihan. Address: Butte, Mont.

Birthplace: Mont.

Patient's or Wife's Maiden Name: Geraldine Ede.

Former Admissions—Self: No. Other Members of Family: No.

When?

Church: Catholic. Lodge: Elks—Eagles.

Payment Plan: No B.C. (Other): Cash on Dismissal.

If an injury, did accident occur on job? If not on job, was
second party involved?

Guarantor: Joseph P. Address: Billings. Phone, Business:
Home:

Occupation: Attorney at Law. Employer: Self. How Long:

I hereby promise to pay for Hospital Service Rendered the Patient
hercon:

/s/ JOSEPH P. HENNESSEY,

Guarantor.

/s/ C. RAINEY,

Registrar.

(Reverse Side)

E 1/3/50—Room 950

D 1950 1/3 to 1/31 1/31 to 2/28 2/28 to 3/12

Day Rate Service

Room 211	\$266.00	\$266.00	\$114.00
Dressings		2.75	1.50
Pharmacy	167.50	20.30	.85
Laboratory	99.00	11.00	.....
Physio-Therapy	2.00	40.00	2.00
X-ray	30.00	25.00	.....
EKG	7.50	.....	.....
	<hr/>	<hr/>	<hr/>
	\$572.00	\$365.05	\$118.35

	Debits	Credit	Balance
1/31/50—Entry page R1408-A	\$572.00	.....	\$572.00
2/28/50—Entry page R1425	365.05	.....	937.05
3/ 7/50—Entry page C1790		250.00	687.05
3/12/50—Entry page R1433	118.35	.....	805.40
5/26/50—Entry page C1852		100.00	705.40

Address: Stapleton Bldg.

Name: Hennessey, Joseph P. [305]

HARRY C. WHEELER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Doepker:

Q. Please tell the Court your name?

A. Harry C. Wheeler.

Q. What, if any, business or occupation do you have? [302]

A. I am the administrator of the Billings Deaconess Hospital.

Q. As such administrator of the Billings Deaconess Hospital, do you have records of the hospitalization of Joseph P. Hennessey from the 3rd of January, 1950, through to the 12th of March, or approximately those dates? A. We do.

Q. Was that record kept in the usual course of business of the hospital? A. It was.

Q. Was it kept correctly? A. It was.

Q. This statement represents the charges made itemized, is that right? A. That's right.

Q. You have both the original and an exact copy, is that right? A. That's right.

Q. You would prefer to retain the original and substitute the exact copy, is that right?

A. That's right.

Mr. Doepker: Do you have any objection?

Mr. Angland: I have no objection at all. [303]

H. EDGAR STRAHL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Angland:

Q. State your name, please?

A. H. Edgar Strahl.

Q. Where do you live, Mr. Strahl?

A. Pocatello.

Q. What official position, if any, do you have with the Government?

A. Special Agent, Federal Bureau of Investigation.

Q. In the course of your duties, Mr. Strahl, have you been [222] assigned to do some investigating for the Government in this case?

A. I have.

Q. This case now on trial. Did you take some photographs during the course of your investigation?

A. I did.

Q. And various measurements?

A. That is correct.

Q. I will hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 4, and ask you if you know what that is?

A. That is a photograph of the men's wash room at the airport known as Phillips Field in Pocatello, Idaho.

Q. Does it accurately portray what it purports to show?

(Testimony of H. Edgar Strahl.)

A. As of the time the photograph was taken, yes.

Q. When was the photograph taken?

A. On January 5th of this year, 1953.

Mr. Angland: Before making the offer, I wish to advise the Court I will connect this up with another witness to show the condition of the washroom on June 2nd, 1949, and with that understanding, I will at this time offer in evidence Defendant's Exhibit 4.

Mr. Doepker: We won't have any objection if it is connected up.

The Court: Very well.

(Plaintiff's Exhibit 4, being a photograph of the [223] men's washroom at the airport building, Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. Now, Mr. Strahl, I'll hand you what has been identified as Defendant's Exhibit 8, and ask you if you know what that is?

A. That is a photograph of another angle of the men's washroom at the airbase known as Phillips Field, Pocatello, Idaho.

Q. When was that photograph taken?

A. January 5th, 1953.

Q. Does that accurately portray what it purports to show? A. It does.

Mr. Angland: I will offer it in evidence at this time, with the same understanding as the other photograph, as Defendant's Exhibit 8.

(Testimony of H. Edgar Strahl.)

Mr. Doepker: No objection if it is connected up.

The Court: Very well.

(Defendant's Exhibit 8, being a photograph of the men's washroom at the airport building, Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. I'll hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 9. Do you know what that is?

A. That is a photograph of one portion of the men's washroom, Pocatello Airport, Pocatello, Idaho.

Q. Does it accurately portray what it purports to show? A. It does.

Q. When was that photograph taken? [224]

A. This was taken the approximate dates of August 17th to 20th of 1951.

Mr. Angland: With the same understanding, your Honor, I will offer Defendant's Exhibit 9.

Mr. Doepker: No objection, your Honor.

The Court: Very well.

(Defendant's Exhibit 8, being a photograph of a portion of the men's washroom at the airport building, Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

The Court: Very well.

Q. Did you take other photographs, Mr. Strahl?

A. I have.

(Testimony of H. Edgar Strahl.)

Mr. Angland: I don't know how many we are going to need, so I think I had better offer them all, your Honor.

The Court: I wonder if it is necessary. Let me see them.

Mr. Angland: Some of them your Honor won't be able to understand without having looked at the diagram and Mr. Livingston's deposition.

The Court: If that is the situation you had better decide what you want and if you need them all, why offer them.

Mr. Angland: I am inclined to think we need them all. Mr. Doepker, do you want to take a quick look at them here?

Q. Mr. Strahl, I'll hand you what has been identified as Defendant's Exhibit 11, and ask you if you know what that is? A. I do.

Q. And does that accurately portray what it purports to [225] show? A. It does.

Q. And what is that?

A. It is a photograph of the lobby of the airport located at Pocatello, Idaho, taken from the approximate position of Western Air Lines' counter—that is where I was standing when I took the picture—directing the camera to the men's washroom and Weather Bureau entrance from the lobby.

Q. When was that picture taken?

A. January 3rd, 1953—I beg your pardon, correction, January 5th, 1953.

(Testimony of H. Edgar Strahl.)

Mr. Angland: With the same understanding, I would like to offer that.

The Court: Very well.

(Defendant's Exhibit 11, being photograph of the lobby of the airport building at Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. Now, with reference to Defendant's Exhibit 11, would you just mark with an arrow the entrance to the men's washroom? A. I have.

Q. Mr. Strahl, I'll hand you what has been identified as Defendant's Exhibit 12, and ask you if you know what that is?

A. Another photograph of one portion of the men's washroom, Pocatello City airport, Pocatello, Idaho.

Q. Does that accurately portray what it purports to show? [226] A. It does.

Q. When was that photograph taken?

A. January 5th, 1953.

Mr. Angland: With the same understanding, we will offer Defendant's Exhibit 12 in evidence.

Mr. Doepker: No objection.

The Court: Admitted.

(Defendant's Exhibit 12, being a photograph of a portion of the men's washroom at the airport building, Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

(Testimony of H. Edgar Strahl.)

Q. I will hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 13, and ask you if you know what that is? A. I do.

Q. Does that accurately portray what it purports to show? A. It does.

Q. What does that photograph show, Mr. Strahl?

A. It is a photograph of the attic portion of the City Airport at Pocatello, Idaho. It was taken from the attic entrance, and in taking the photograph, I was standing in the room where the theodolite room is.

Q. What date did you say this was taken?

A. This was taken during August, 1951, the exact date I don't have at this time.

Mr. Angland: I might state to both Court and counsel there is some change as to conditions, so I will offer this for [227] illustrative purposes.

Mr. Doepker: We have no objection to it being offered for illustrative purposes, subject to its being explained if the witness is able to explain it.

The Court: Very well.

(Defendant's Exhibit 13, being a photograph of the attic of the airport building at Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. I will hand you what has been identified as Defendant's Exhibit 14. I will ask you if you know what that is? A. I do.

(Testimony of H. Edgar Strahl.)

Q. Does that accurately portray what it purports to show? A. It does.

Q. When was it taken?

A. During August, 1951.

Q. What does it purport to show?

A. It is the opening into the attic portion of the Pocatello airport at Pocatello, Idaho. It was taken from the theodolite room, and approximately eight to 10 feet from the attic doorway, pointing into the attic.

Mr. Angland: On the same basis, I will offer this, for illustrative—Exhibit 14 for the Defendant, for illustrative purposes, with the understanding we will connect it up.

Mr. Doepker: No objection.

The Court: Very well. [228]

(Defendant's Exhibit 14, being a photograph of the attic of the airport building at Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. I hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 15, and ask you if you know what that is? A. I do.

Q. Does that accurately portray what it purports to show? A. It does.

Q. When was that photograph taken?

A. During August of 1951.

Q. And what does that purport to show?

(Testimony of H. Edgar Strahl.)

A. That is a photograph of the attic doorway leading into the attic portion.

Q. Which would be the portion of the attic immediately above the men's washroom?

A. Men's washroom and lobby of the airport.

Mr. Angland: Again I will offer that for illustrative purposes with the understanding we will connect it up.

Mr. Doecker: No objection, your Honor.

The Court: It is so admitted.

(Defendant's Exhibit 15, being a photograph of the attic of the airport building at Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. I will hand you, Mr. Strahl, what has been identified as [229] Defendant's Exhibit 16, and ask you if you know what that is? A. I do.

Q. Does that accurately portray what it purports to show? A. It does.

Q. And what is that a photograph of?

A. The photograph is taken in the attic of the Phillips Field Airbase at Pocatello, Idaho, standing inside the attic and pointing the camera toward the attic entrance and into the theodolite room. There is a person, I notice, standing there at the entrance-way for the purpose of giving an idea of the height of the doorway there.

Q. When was that photograph taken, Mr. Strahl? A. During August, 1951.

(Testimony of H. Edgar Strahl.)

Mr. Angland: With the same understanding that this is for illustrative purposes and that it will be connected up, it is offered.

Mr. Doepker: No objection.

The Court: It is so admitted.

(Defendant's Exhibit 16, being a photograph of the attic of the airport building at Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. I will hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 17, and ask you if you know what that is? A. I do.

Q. Does that accurately portray what it purports to show? [230] A. It does.

Q. What is that a photograph of?

A. A portion of the men's room, Phillips Field Airbase, Pocatello.

Q. When was that photograph taken?

A. During August of 1951.

Mr. Angland: At this time I will offer in evidence Defendant's Exhibit 17 with the understanding that we will connect it up.

Mr. Doepker: No objection.

The Court: It is so admitted.

(Defendant's Exhibit 17, being a photograph of a portion of the men's room at the airport building, Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

(Testimony of H. Edgar Strahl.)

Q. Mr. Strahl, did you take—I beg your pardon, I thought I had all the photographs. I'll hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 18, and ask if you know what that is?

A. I do.

Q. Does that accurately portray what it purports to show? A. It does.

Q. When was that photograph taken?

A. During August, 1951.

Q. What is it a photograph of?

A. A portion of the men's room located at the City Airport, [231] Phillips Field, Pocatello, Idaho.

Mr. Angland: With the understanding we will connect it up, I offer it.

Mr. Doepker: No objection.

The Court: It is so admitted.

(Defendant's Exhibit 18, being a photograph of a portion of the men's room at the airport building, Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.)

Q. I will hand you, Mr. Strahl, what has been marked as Defendant's Exhibit 19, and ask you if you know what that is?

A. Yes, that is a portion of the men's room in the Phillips Airbase, Pocatello, Idaho.

Q. When was that photograph taken?

A. January 5th, 1953.

Q. Does it accurately portray what it purports to show?

(Testimony of H. Edgar Strahl.)

A. It does, and as a matter of full explanation, the washbasin appearing therein is located at the northwest corner of the washroom.

Mr. Angland: With the understanding that we will connect it up, I will offer in evidence Exhibit 19.

Mr. Doepker: No objection.

The Court: Admitted.

(Defendant's Exhibit 19, being a photograph of a portion of the men's room at the airport building, Pocatello, Idaho, was here received in evidence, and the same is on file in the Clerk's office in this cause.) [232]

Q. I will hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 20. Will you state whether or not you know what that is?

A. I do.

Q. Does that accurately portray what it purports to show? A. It does.

Q. Did you take that photograph?

A. I did; it was taken—it is a portion of the theodolite room in the City Airport, Phillips Field, Pocatello, Idaho.

Q. When did you take that photograph, Mr. Strahl? A. January 5th, 1953.

Mr. Angland: I'll offer that for illustrative purposes.

Mr. Doepker: No objection.

The Court: Very well.

(Testimony of H. Edgar Strahl.)

(Defendant's Exhibit 20, being a photograph of a portion of the theodolite room in the airport building at Pocatello, Idaho, was here received in evidence, and is on file in the Clerk's office in this cause.)

Q. Mr. Strahl, directing your attention to Defendant's Exhibit 4, did you make any measurements in the men's room as portrayed in Defendant's Exhibit 4? A. I did.

Q. Can you tell us how far from the northerly wall, I believe it is, the first wash basin in a southerly direction is located?

A. If I may refer to my notes that I took at the time? [233]

Mr. Doepker: Certainly.

A. The wash basin is $22\frac{1}{4}$ inches from what you describe as the north wall of the washroom.

Q. That would be the northerly edge of the washbasin?

A. Yes, the edge of the washbasin closest to the north wall.

Q. Yes. How far from the floor is the top edge of that washbasin? A. 30 and $\frac{3}{4}$ inches.

Q. How deep is the wash basin from the wall, how far——

A. The washbasin is $15\frac{1}{2}$ inches deep and $18\frac{1}{4}$ inches wide.

Q. Mr. Strahl, in Defendant's Exhibit 4, I believe, is what you are looking at, isn't it?

A. Yes.

(Testimony of H. Edgar Strahl.)

Q. There appears to be a shelf which is below the mirrors. Did you make any measurements with reference to that shelf? A. I did.

Q. How far above the washbasin is that shelf, or did you measure it from the floor?

A. I did not measure it from the washbasin; I measured it from the floor.

Q. That is just as well.

A. It is $54\frac{1}{2}$ inches, the upper edge of the shelf, from the floor of the washroom. [234]

Q. $54\frac{1}{2}$? A. Yes.

Q. That is the upper edge of the shelf?

A. Yes, where normally you would place combs and brushes and such instruments.

Q. Mr. Strahl, describe that shelf to us, will you?

A. The shelf is $7\frac{1}{2}$ inches in depth, that is, from the wall, extending out into the wash room $7\frac{1}{2}$ inches, and it is supported underneath by the usual wooden supports which are attached to the wall, and upon the shelf is a plate glass approximately $\frac{1}{4}$ -inch thick, apparently for sanitation purposes, set upon the wooden shelf. The shelf itself—I did not make exact measurements as to the length of the shelf; it extends over the three wash basins appearing in the photograph, and would approximate eight feet in length.

Q. Mr. Strahl, does the plate glass top extend out to the edge of the shelf, or is it set back from the edge?

(Testimony of H. Edgar Strahl.)

A. It follows the exact contours of the shelf.

Q. Completely covers it? A. Yes.

Q. Were you able, Mr. Strahl, to trace the pipe appearing in the right hand side of Plaintiff's Exhibit 4 up into the attic? A. I was.

Q. Can you point out the same pipe, say on Defendant's [235] Exhibit 16?

A. On Defendant's Exhibit 16, the pipe appears black in color and, in facing the photograph, it is to the immediate right of the attic opening, the same pipe, as traced. It appears in white in Defendant's Exhibit 4, and it appears to the immediate right of the wash basin nearest to the north wall.

Q. Did you measure the distance from the north wall in the men's room that the pipe is located?

A. It will have to be a matter of deduction here. It is a distance of $22\frac{1}{4}$ inches from the north wall to the nearest edge of the first wash basin. The standpipe is 9 inches from the same edge of the wash basin, leaving approximately $13\frac{1}{4}$ inches. I believe that is the mathematics of it.

Q. From the north wall?

A. Yes, to the stand pipe.

Q. Mr. Strahl, directing your attention to Defendant's Exhibit 14, can you also point out that pipe in that exhibit?

A. The pipe is black in color, and appears just inside the attic door to the immediate left of Defendant's Exhibit 14.

(Testimony of H. Edgar Strahl.)

Q. To the left of the door shown?

A. To the left of the door shown, yes.

Q. Mr. Strahl, does that pipe have elbows or bends in it?

A. No, it extends straight up from the men's wash room up into the attic portion, and after reaching the attic portion, [236] it extends for a matter of some six or seven feet, and I did not trace it thereafter. For all I know, it may have gone up through the roof.

Q. What I am interested in is whether or not there is any bend between the pipe as shown in Defendant's Exhibit 14, 4, and we had one other.

A. And 16.

Q. Yes, 14, 4 and 16.

A. No, from my investigation of the pipe, it is straight up and down.

Q. How big around is that pipe, approximately, accurately, if you know?

A. I don't know accurately. It appears to be six or eight inches around.

Q. It is a large——

A. For the purposes of drainage from the wash room there.

Q. Possibly four inches in diameter?

A. Yes, yes, that would be an approximation of it.

Q. Did you measure, Mr. Strahl, the distance from the theodolite room or the top of the vault, as we call it, to the door to the attic, as shown in Defendant's Exhibit 14?

(Testimony of H. Edgar Strahl.)

A. The measurements of the atticway?

Q. The measurement from the floor up to the entrance to the attic?

A. Yes, I understand you now. I did measure that, and it [237] is two feet, seven inches from the floor of the theodolite room to the lower portion of that entrance to the attic.

Q. Now, would you give us the dimensions of the doorway, if you actually measured it? I don't believe that is in the record.

Mr. Doepker: It was estimated in one of the depositions.

Q. Did you accurately measure it?

A. Yes, I did. The exact measurement of the opening into the attic is 18 inches wide by 45½ inches high.

Q. Mr. Strahl, as you, as a person would look at Defendant's Exhibit 16, did you measure any distances within the attic itself? A. I did.

Q. Now, will you tell us whether the joists in the attic run across that picture?

A. Parallel with the attic entrance, I believe.

Q. Parallel with the attic entrance?

A. That is correct, that is the manner in which the joists run.

Q. What is the distance from the entryway to the attic to the first joist? A. 22 inches.

Q. How far is it to the second joist?

A. 18 inches.

Q. That is from—— [238]

(Testimony of H. Edgar Strahl.)

A. If I might explain it. I measured approximately four joists. It is 22 inches to the first joist. For some purpose in building the building, they built the first joist 22 inches deep, and then I measured the next three, and they came to within $\frac{1}{4}$ inch of 18 inches, and the remaining joists appeared proportionate to the 18 inches measured, so I didn't measure any further than that.

Q. While the deposition hasn't yet been read, Mr. Strahl, it appears from the deposition of Fay Livingston, which is already introduced in evidence, that reference was made to a light plug in the wall in the theodolite room. How many light plugs are in that room, do you know?

A. There is only one outlet.

Q. Only one outlet?

A. And it will appear—

Q. Examine, please, Defendant's Exhibit 20, and you might, if it shows on there, you might mark the light plug.

A. On Defendant's Exhibit 20, the light plug appears near the top step of the steps appearing in the photograph, and I am placing an arrow pointing to the outlet as described.

Q. How far, approximately, if you know, is the light plug from the opening into the attic? Can you take two of these photographs and illustrate to the Court just how that room up there is arranged? I think it might be helpful to the Court

(Testimony of H. Edgar Strahl.)

if you take two photographs and point out how the arrangement [239] is in the theodolite room, vault we call it.

A. I might have that diagram, I could do it better. I didn't make any special tape measurements.

Q. Can you illustrate the arrangement of the theodolite room from any photographs by holding two of them together? Can you point out to the Court what that arrangement is up there? I think that might be helpful.

A. Well, Defendant's Exhibit 20 and Defendant's Exhibit 14 show the portions of the theodolite room at the extreme corners. The Defendant's Exhibit 20 shows the southwest corner of the room, and the Defendant's Exhibit 14 shows the northeast corner of the room; and the extension from the light plug to the attic entrance would be approximately 15 feet. You could clear that up better with your blueprint scale on it, I am sure. That is strictly a measurement I did not measure.

Q. Did you, Mr. Strahl, make a sketch of the stairway, the Weather Bureau, the top of the vault, or theodolite room, and illustrating the arrangement in the area that we have been talking about in this case?

A. I did, I made two rough draft drawings, one of them for more of a side view, and the other one attempting to portray the view from the top looking down upon the entire outline which appears in the diagram.

Q. Mr. Strahl, I'll hand you what has been iden-

(Testimony of H. Edgar Strahl.)

tified as [240] Defendant's Exhibit 21, and ask you whether or not that is one of the sketches to which you have made reference? A. It is.

Q. It doesn't purport to be an accurate diagram for the purposes of illustrating the physical facts down there? A. That's correct.

Q. I'll hand you, Mr. Strahl, what has been identified as Defendant's Exhibit 22, and ask you if that likewise is one of the diagrams you made?

A. That is a rough sketch attempt to portray a side section of that portion of the building of interest to the immediate case.

Q. You don't pretend to be an engineer?

A. No, I am not qualified as an engineer.

Mr. Angland: I'll offer Defendant's Exhibits 21 and 22 merely for illustrative purposes and no other purposes, your Honor.

Mr. Doecker: We don't have any objection to their being used for that purpose, your Honor.

The Court: Very well.

(Defendant's Exhibits 21 and 22, being rough sketches of a portion of the airport building at Pocatello, Idaho, were here received in evidence, and the same are on file in the clerk's office in this cause.)

Mr. Angland: I thought they might be helpful to the Court is the only reason I offer them at all. I think that [241] about covers it pretty well. You may cross-examine.

(Testimony of H. Edgar Strahl.)

Cross-Examination

By Mr. Doepker:

Q. In connection with the exhibits, Defendant's Exhibit 16, Defendant's Exhibit 14, Defendant's Exhibit 15, and Defendant's Exhibit 13, in taking those photographs, Mr. Strahl, were they taken with flashlight bulbs?

A. Yes, a Speed Graphic with flash bulb, and I have the exact readings on other notes if it would be necessary.

Q. In other words, to get the attic, you used a flash bulb to take the photographs?

A. That is correct.

Q. And with respect to Defendant's Exhibit 11, the waiting room there shown, and the door of the men's toilet with the sign above it "Men," that is directly westerly from the waiting room, is it, in the west wall of the waiting room?

A. Westerly, yes. It is actually slightly north-west; as was previously pointed out, it is not exactly on the square.

Q. I observe in the Defendant's Exhibit 11 a doorway which would be, I presume, the northwesterly corner of the waiting room, is that correct?

A. That is correct.

Q. That doorway leads where, sir?

A. It is a double doorway, and it leads directly

(Testimony of H. Edgar Strahl.)

out to the [242] airport there, where the customers go through to the waiting airplanes.

Mr. Doepker: I believe that is all.

Redirect Examination

By Mr. Angland:

Q. Mr. Strahl, did you take the other photographs with flash bulbs as well?

A. Yes, they were all taken with flash bulbs.

Mr. Angland: That is all.

(Witness excused.) [243]

LOUIS CLAYTON ALLARD

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Angland:

Q. Will you state your name, please?

A. Louis Clayton Allard.

Q. Where do you live?

A. Billings, Montana.

Q. And what business or profession are you engaged in? A. I am a physician and surgeon.

Mr. Doepker: We will admit Dr. Allard's qualifications as a physician and surgeon; that he is duly licensed to practice his profession in the State of Montana, and has been practicing in Billings, Mon-

(Testimony of Louis Clayton Allard.)

tana, and that he is a physician and surgeon—what is your specialty, Doctor?

A. Orthopedics.

Mr. Doepker: And that he is a specialist in orthopedics.

Q. And he has confined his practice to that for how long, Doctor? A. Seven years.

Mr. Doepker: Seven years.

Q. In the practice of orthopedics, what principally do you have to do with, what parts of the body?

A. Diseases and various conditions of the musculo-skeleto [396] system.

Q. If you find a crippled condition of any kind, and it appears to be due from the condition of the muscles or bones, then, that falls into the orthopedic field, is that right? A. Yes, sir.

Q. Then when you encounter a case involved around a muscular or skeletal system, Doctor, do you of necessity have to get into the nervous condition and the circulatory system?

A. Very frequently, yes, sir.

Q. You attempt to find out what has caused the condition, is that it? A. Yes, sir.

Q. Dr. Allard, have you, in the course of your studies and your practice, studied the formation of thrombosis in the blood vessels? A. Yes, sir.

Q. I wonder, Doctor, if you would just take a slip of paper and sketch a vessel, and tell us, indicate to us how the thrombus develops?

A. I have drawn what, in my artistic way, would

(Testimony of Louis Clayton Allard.)

be a cross section of a blood vessel, with the outer walls, the muscle walls, and the lining of the vessel, whether it is an artery or vein, and the lumen, or the whole in the center.

Q. Let me ask you this: Supposing you had a small blood clot, or a breaking or tearing of that blood vessel on the [397] inner wall, would a thrombus develop, in all probability?

A. In all probability, yes, it would.

Q. Will you point out, illustrate to us, how that develops?

A. Because of small changes in the wall, any irregularity, the cells, platelets, blood cells, begin to pile up, you might say catch on this roughened surface, and continue to catch and pile up on this until such time as that thrombus has gone as far as possible, which is filling the vessel completely.

Q. Completely blocked the vessel?

A. Yes, sir.

Q. Doctor, how long, according to your studies and your experience, does it take for a complete filling of, say, the vena cava to fill, if you know?

A. Well, you see, in my experience, I have never seen an occluded vena cava. However, as an estimate, depending on the condition that gave rise to the thrombus, I would estimate anywhere from several days up to perhaps 10 days time at the most for this vessel to be occluded.

Q. That would mean a blocking off of the vena cava?

A. Yes, sir, completed.

Q. Actually, however, Doctor, you have never

(Testimony of Louis Clayton Allard.)

side of the foot, the superior aspect of the foot and lower calf; the second sacro nerve, the posterior aspect of the thigh and upper calf; third sacro nerve, is closer to the anus, and the fifth, right in the region of [400] the anus.

Q. If you have, Dr. Allard, a vein or veins being occluded down in here below the second lumbar region, what would happen with respect to these nerves?

A. It would be anticipated that it would produce some swelling within the spinal canal, and, therefore, increased pressure on these nerve trunks.

Q. The nerve trunk—in other words, Doctor, when you speak of the nerve trunk coming out, you don't mean a nerve running like a fish line down to the foot, say; you mean a trunk that winds around as you have illustrated into various portions of the lower part of the body? Each one of those trunks follows through to the different portions in the lower part of the body, is that right?

A. Yes, there is a typical segment in which it is illustrated (indicating in book).

The Court: I don't wish to interfere with you, Mr. Angland, except that as far as I recall, there is no testimony with reference to the occlusion. When you speak of occlusion, that means the complete blocking, is that it?

A. Yes, sir.

Mr. Angland: I am sure, your Honor, if I go through Dr. Horst's testimony of Saturday—

(Testimony of Louis Clayton Allard.)

The Court: It is based upon the fact that he says there is occlusion? [401]

Q. You have had the opportunity to hear that testimony to some extent, Dr. Allard?

A. Yes, sir.

Q. Did you understand him to speak of an occlusion of the vessel, of the vein, leading to the spine? A. That was my interpretation.

The Court: It just occurred to me he talked about a partial occlusion and not an occlusion of the vena cava.

Mr. Angland: In the vena cava, he did say partial occlusion, but as to the vessels, your Honor, running back to the spine, he said there was a shutting off, a complete occlusion as to some of them? Isn't that your understanding, Dr. Allard?

The Court: It isn't going to make any difference what Dr. Allard understands, it is what the record shows.

Mr. Angland: I have looked the record over.

The Court: I was mistaken myself, I suppose.

Q. Dr. Allard, have you ever heard of a thrombus developing in the vena cava and dropping down, or floating down, or drifting down to the lower extremities? A. No, sir, I have not.

Q. If there was, Doctor, a thrombus, just presuming there was a thrombus that was partial as to the vena cava, what would be the effect of that thrombus on the lower extremities?

A. Now, do I understand you correctly, if there

(Testimony of Louis Clayton Allard.)

were a [402] thrombus partially filling the lumen, the inside of the vena cava?

Q. That's right.

A. As long as the thrombus was partial, I don't believe that until it had reached a considerable size that it would have any effect on the lower extremities. However, that thrombus would continue to build until it occluded the vena cava, thereby producing a damming back of the drainage of the blood from the veins out of the lower extremities, and most certainly severe swelling of the lower extremities.

Q. How long would it, in your estimation, presuming a thrombus could develop in the vena cava, how long—strike that. Does a thrombus, Doctor, just attach to the wall of any blood vessel and then build a little and stop, or just how fast do they build?

A. Well, as I stated awhile ago, it is difficult to make any accurate statement as to the rate which they build up. However, they do not attach to the wall and build a partial thrombus and then stop. The condition continues.

Q. They keep building until they completely occlude the vessel? A. That's right.

Q. How long is the longest time that you have read of or heard of or learned of in your experience that it has taken a thrombus to occlude a blood vessel? [403]

A. Well, again I don't have any accurate fig-

(Testimony of Louis Clayton Allard.)

ures. However, it would be my estimation again that it would cover a period of probably not exceeding two weeks time.

Q. Two weeks would be the maximum for the thrombus to develop and occlude the vessel, in your opinion? A. And occlude the vessel, yes, sir.

Q. Doctor, have you examined Mr. Joseph P. Hennessey, the plaintiff, in this case?

A. Yes, sir, I have.

Q. When did you make your examination?

A. On January 13th, 1953.

Q. Will you, without giving your conclusions as to his condition, Doctor, will you just advise us what you did in making the examination? Did you give him a complete physical examination, what we would term a complete physical?

A. A general physical.

Q. What does a general physical examination consist of?

A. Well, sir, I elicited the history from Mr. Hennessey, and examined the heart, lungs, blood pressure, pulse rate, and the lower extremities.

Q. What did you find with respect to the lower extremities, Doctor?

A. At the time of my examination, it was found that the lower extremities were of equal length. There was atrophy of the lower calf and foot on the left, with change in the [404] consistency and a brownish discoloration of the left foot. The neutral, or most relaxed position of the foot was at an

(Testimony of Louis Clayton Allard.)

angle of 145 degrees, which, in our measurements, assumes that when the foot is parallel with the foreleg that that is 180 degrees, and when it is right angle to the foreleg, that is 90 degrees. The left foot could be forced up to, or dorsiflexed upward to 135 degrees, and plantarian flexed, or moved downward, to 160 degrees. There was a mild degree of limitation of inversion of the foot, rotating it inward, and moderate limitation of eversion of the foot. The contour of the right leg appeared normal. There was a full range of motion of the foot at the ankle, but the extreme of dorsiflexion, or forcing the foot upward, produced pain in the upper calf, posteriorly. There was also tenderness on pressure in the upper one-third of the right calf posteriorly. The arterial pulsations of the ankle and foot regions, both sides, were markedly diminished to palpation. Tests of his sensation by means of knife point revealed marked increased sensitivity of the entire left foot below the ankle, and this was most marked on the sole of the foot. There was also increased sensation of the toes of the right foot. That is my finding.

Q. Did Mr. Hennessey, in giving you the history of this matter, tell you that his trouble had developed while he was in the Deaconess Hospital in Billings, Montana, in January of 1950? [405]

A. Yes, sir.

Q. Have you had an opportunity, Dr. Allard, to review that hospital record?

A. Yes, I reviewed it.

(Testimony of Louis Clayton Allard.)

Q. That is identified as Defendant's Exhibit 2. Have you gone over that record, Doctor, in an attempt to determine the cause or source of Mr. Hennessey's present difficulty? A. Yes, I did.

Q. And what, in your opinion, Doctor, was the cause of his difficulty?

A. It was my impression that Mr. Hennessey suffered an occlusion—first of all suffered a saddle embolus at the bifurcation of the aorta, and that on this same day, that slipped off the saddle and lodged in the arteries of the left lower extremity, producing an occlusion of the arterial supply there.

Q. Doctor, is there any way that you know that you can determine what the source of the embolus was? A. In this particular case?

Q. Yes.

A. Now, sir, checking over the various possibilities as to sites of origin of this embolus, there is nothing specific to indicate any definite site of origin and nothing to give us a clue or guide as to this area.

Q. What, in fact, is an embolus, Doctor? [406]

A. An embolus is a loose—in this particular case, a loose blood clot in a blood vessel. It is a broken off thrombus or a clot that is free.

Q. Yes. Would a thrombus that developed 20 years previously be as well attached for medical purposes to the walls of a blood vessel as would a thrombus five years old or six months old?

A. Yes, sir, I believe that for these various pe-

(Testimony of Louis Clayton Allard.)

riods of time, six months upward, that the thrombus would have organized, or have changed into scar tissue, and by that time would be an integral part of the blood vessel, rather than an inert clot.

Q. With respect to that, you speak of scar tissue, Dr. Allard. There is a couple of medicines here. There is heparin and——

The Court: Dicumarol.

Q. Yes. You can find it in the hospital chart, that were administered to Mr. Hennessey. What is the effect of those medications, what do they do?

A. Heparin and dicumarol are anti-coagulants; they lower the prothrombin time, or in other words, they lower the clotting ability of the blood in order to prevent propagation of the thrombus, and that is its effect, the prevention of further coagulation.

Q. Do they dissolve the embolus or scar tissue that has fallen off? [407]

A. No, sir.

Q. Just prevent further coagulation, is that the effect, Doctor?

A. Yes, sir.

Q. They don't have the effect of dissolving that?

A. No, sir.

The Court: Doctor, you previously were testifying with reference to the length of time, the maximum length of time that would expire to occlude a vessel?

A. Yes, sir.

The Court: And as I recall, did you say something like two weeks?

A. That would be my estimation under these circumstances, assuming no other disease of the

(Testimony of Louis Clayton Allard.)

blood vessel wall, it would be my estimate as to the probable maximum period.

The Court: Then, counsel has then questioned you with reference to the existence of a thrombus for 20 years. Does a thrombus exist in vessels for 20 years?

A. The thrombus itself—the thrombus is the blood clot in the blood vessel. After a relatively short period of time, this clot begins to organize; it doesn't remain as an inert clot, it changes into fibrous tissue, or scar tissue, but then it is no longer truly a thrombus.

The Court: But becomes part of the vessel?

A. Becomes part of the vessel, yes. [408]

The Court: When that happens, when it attaches itself to the blood vessel, does it stop growing?

A. Does the thrombus stop growing?

The Court: Yes.

A. Well, sir, as previously indicated, in my knowledge, a thrombus will continue to grow until it has filled the opening of the blood vessel, the lumen or canal; that is when it stops, which means it has filled the blood vessel to a maximum, and, therefore, it has stopped growing at that time as far as diameter. The only change could then be in the length of the clot.

Q. (By Mr. Angland): It could continue to grow along the walls of the blood vessel, couldn't it, Doctor, to build up?

A. In length.

Q. Yes, and, as a matter of fact, it could have

(Testimony of Louis Clayton Allard.)

been such it could create canalization, where you develop a canal right through the thrombus, is that right?

A. Ultimately this organization, this forming of scar tissue, will become canalized, which will be a small canal or channel through the center of the fibrous tissue formed which replaced the clot, so, eventually, as a net result, there may be a small canal through the thickened scar tissue.

The Court: It is no longer a thrombus?

A. As soon as the clot is replaced by fibrous material, it is no longer a thrombus. [409]

The Court: But if it just remains a clot, it is then a thrombus, is that so, and within a maximum period of two weeks, it would occlude?

A. That would be my estimation, yes, sir.

The Court: So, unless it changes within that period of time and scar tissue attaches and it then becomes a part of the wall of the vessel, then you would have a complete occlusion within a two week period of time?

A. I don't believe—you say unless it changes within a two week period of time?

The Court: Unless that change occurs within a two week period you will have a complete occlusion?

A. No, sir, we are talking about two different things.

The Court: That is what I am afraid of. Get me straight.

(Testimony of Louis Clayton Allard.)

A. My idea was a period of time—assuming, as we started out, that this clot attaches to some portion of the wall of the blood vessel. The clot then builds until these cells continue to pile on the clot, building the thrombus until such time as the inert blood clot has filled this lumen of this blood vessel.

The Court: Yes.

A. Now, that building of the clot in my estimation, would probably be formed in a maximum of two weeks time. Now, it is a much slower process following that, it probably would require another three or four weeks before there was a sufficient [410] forming of fibrous tissue to have this firmly or reasonably attached to the blood vessel wall, so that then along about that time, we begin to get that situation where we begin the fibrous tissue. We still have some clot. That organization goes on rather rapidly until such time that in a matter of perhaps eight weeks, 10 weeks, 12 weeks, somewhere in that range, this clot then is reasonably firm, fibrous tissue, and no longer really a clot, technically speaking.

The Court: Does it continue to grow?

A. Only in length, because it has filled the entire lumen, entire inside of the blood vessel at that level, so any growth from then on, because this would also occur earlier, would be behind it, downstream in the blood vessel where the cells continue to pile up on the downstream end.

(Testimony of Louis Clayton Allard.)

The Court: You lost me again.

Mr. Angland: I am wondering if the Judge is of the view that the clot might just float around in the body awhile and then become temporarily attached, say, to the aorta. Is that what you have in mind?

The Court: No, as I understand, some irregularity occurs in the inner wall of the vessel——

A. Yes.

The Court: As a result of that irregularity, platelets and the rest of these things that go to make that start building up?

A. Yes. [411]

The Court: And they start filling the vessel?

A. Yes.

The Court: The clot?

A. Yes.

The Court: That is a thrombus, as I understand it.

A. That is the first portion of a thrombus.

The Court: The first portion of a thrombus. How fast does that build?

A. As I answered awhile ago, as to a definite rate, I can't tell you in days or hours or minutes. My idea, based on the thrombi that I have seen and so forth, would be that within a maximum period of two weeks time this clot then has built up so it has filled the blood vessel at this level.

The Court: But you have shut off the flow of blood in that vessel?

A. Yes.

(Testimony of Louis Clayton Allard.)

The Court: Would that be true in the minor, or capillary vessels, whatever you call them, or is it true just as well in the larger vessels, the vena cava and aorta and the rest of them? Would the rate of growth be the same, and would there be occlusion within a period of some two or three weeks?

A. Yes, sir.

The Court: No matter which vessel it is?

A. Yes, sir, the reason I feel that is because of the [412] increased volume.

The Court: It would build up faster.

A. At least at the same rate.

The Court: Or at the same rate. Very well. I think I see what you are talking about. Go ahead.

Q. I would like to further point out in connection with what you are talking about, Dr. Allard, have you in your work as a physician and surgeon any particular time that you become concerned about an embolus following surgery?

A. In general, the most dangerous period of time for a large embolus to occur is about the 10th postoperative day, at which time, if you are going to get into trouble with an embolus arising from a thrombus in a larger vessel, this thrombus has formed, is not yet sufficiently firmly attached to the blood vessel and is dislodged and lodges, say, in the lung, and frequently is of sufficient size to be fatal almost immediately; and that time, as I said, is very frequently about the 10th day following surgery.

(Testimony of Louis Clayton Allard.)

Q. Following that after a 10-day period, the thrombus becomes sufficiently attached that it becomes actually a part of the vessel wall, isn't that the situation, Doctor?

A. Yes, sir, from then on the attachment is becoming more and more firm until eventually, really a short while later, it then is sufficiently firmly attached that it is not going to dislodge at all, it is not going to become free. [413]

The Court: It is also going to block the vessel, isn't it; it is also going to occlude the vessel, is it not?

A. Yes, sir.

The Court: It is going to eventually occlude the vessel?

A. Yes, sir.

The Court: So when thrombus once gets started, that vessel is going to become occluded?

A. Yes, excluding conditions—there is a condition called an aneurysm which occurs in the arterial system, which is a dilation or ballooning out of the walls of an artery due to a weakening, and the aneurysm can have a thrombus in the wall over a longer period of time. That is the only condition in which the artery isn't going to rapidly occlude.

The Court: That is a different situation. So, when the vessel is finally occluded, which is ordinarily within a two or three week period, then the circulatory system has to develop an auxiliary or collateral system to pass the blood by that point, is that it?

(Testimony of Louis Clayton Allard.)

A. Yes, sir.

Q. On that subject, Doctor, if you had an occlusion of the vena cava, where would your auxiliary or collateral vessels be?

A. The principal circulation would be through the superficial veins of the abdomen wall anteriorly which, below the level of the navel, ordinarily drain downward into the iliac veins, and then into the veins above the navel which drain upward to the superior vena cava. [414]

Q. How obvious are these veins on the abdomen that would be apparent if you had an occlusion of the vena cava?

A. They are quite distinctly visible, very easily seen as enlarged veins.

Q. Very much enlarged? A. Yes, sir.

Q. Something like the back of the hand?

A. Larger than that.

Q. Larger than that, more apparent?

A. Yes, sir.

Q. Did you find any condition of that kind with respect to Mr. Hennessey, the plaintiff in this case?

A. No, I didn't.

Q. I think you have already stated, Doctor, that you were unable from your examination of Mr. Hennessey and the examination of the chart from the Deaconess Hospital to fix the source of the embolus that became a saddle embolus in the aorta, is that right? A. That's right.

Mr. Angland: That's right. You may cross-examine.

(Testimony of Louis Clayton Allard.)

Cross-Examination

By Mr. M. F. Hennessey:

Q. Doctor, at the time you examined Mr. Hennessey, did you check his shoulder or his back?

A. Yes, I checked his right shoulder and his neck. [415]

Q. And did you find anything at that time as to the right shoulder and neck?

A. Yes, sir, the examination of the right shoulder region revealed mild tenderness of the mid-portion of the trapezius muscle, which is the prominent muscle extending across the top of the shoulder area on the right. There was no palpable spasm of this muscle at this time. The contour of the shoulder was normal. There was full range of motion of the shoulder, with pain in the mid-portion of the trapezius muscle, or tender area, on the extremes of motion. There was mild grating and crepitation on the extreme of abduction, which is moving the arm straight out from the side of the body. Did you ask me just about the shoulder, sir?

Q. Just the shoulder and back.

A. On examination of the neck, there was tenderness over the spinous process, which are palpable bony process of vertebra in the lower cervical region, approximately the fourth, through and including the 7th cervical vertebra. There was also tenderness of the adjacent erector spinae muscles in the same area. There was a full range of motion

(Testimony of Louis Clayton Allard.)

of the neck, and mild crepitation was again noticed approximately over the spinous process of the fifth cervical vertebra.

Q. Doctor, I believe you said from the examination of the chart, it was your impression that Mr. Hennessey had a saddle embolus at the bifurcation of the aorta, is that right?

A. Yes, sir. [416]

Q. Would you state to me what the probable source of that saddle embolus would be, where would it probably come from?

A. I have stated that I don't know.

Q. You don't know? A. Yes, sir.

Q. Would it be possible, Doctor, for a blow to distend the aorta and injure the inner lining, and thereby have an embolism start there?

A. A thrombus?

Q. Yes, a thrombus.

A. Do you mean a direct blow?

Q. No. Assuming that Mr. Hennessey received a severe blow on the shoulder and the blood was compressed down in the aorta?

A. I don't believe so.

Q. Could any type of injury, Doctor, to the inner lining of the aorta, would that cause a thrombus to form? A. Yes.

Q. And here is where I am confused. Have you ever observed where there was a thrombus in the aorta? A. No, sir, not in the aorta itself.

Q. Not in the aorta itself? A. No, sir.

(Testimony of Louis Clayton Allard.)

Q. Now, it is my understanding that at one time you testified that if the thrombus had been formed, it is possible that after six months, it would be a little difficult to dislodge, five [417] years old, or 20 years old, it would still remain there, is that right, it would not dislodge? A. That's right.

Q. But within two weeks, the whole blood vessel would be blocked off, is that right?

A. That's right.

Q. Then it is impossible—any time, under your theory, anytime you have an injury to the lining of the aorta which would cause a thrombus to form that within two weeks, that portion of the body, the blood supply would be cut off?

A. I don't believe I understand that.

Q. Well, I think that was what was bothering the judge.

A. Would you repeat the question is what I meant.

Q. Well, assume, Doctor, there is an injury to the inner lining of the aorta? A. Yes, sir.

Q. Is your contention that when the workings of the blood and the body to repair that injury began, it would start a thrombus, is that correct?

A. Yes, sir.

Q. Then, within two weeks, the artery would be completely blocked off and no blood would come down through the aorta? A. Yes, sir.

Q. And that would apply to any vessel in the body? A. Yes, sir. [418]

Q. And it would be impossible, you believe, to

(Testimony of Louis Clayton Allard.)

have a clot that would only partially block a blood vessel? A. Yes, for any period of time.

The Court: Doctor, what would be the evidences of a thrombus in the aorta that has grown to occlusion?

A. The evidence would be, because of the shutting off of the arterial blood supply beyond that level, or nearly completely shutting it off, because the collateral supply will not develop as rapidly, there would be excruciating pain; there would be first of all, a conspicuous pallor, a very white, dead appearance of the skin, that is, a whitish, and ultimately the sloughy bluish discoloration which precedes gangrene, and ultimately gangrene, if it were occluded at that level, and assuming that the patient survived long enough to develop gangrene.

The Court: Would that be a violent assumption?

A. Which?

The Court: To assume the patient would live long enough to develop gangrene if the aorta were occluded?

A. I don't believe they would live that long.

The Court: Yes, that is what I say, that would be a violent assumption that they would live that long to develop gangrene if the aorta occluded.

A. Yes.

The Court: But you think that the emboli that lodged in the [419] lower extremities of Mr. Hennessey came through the aorta?

A. Yes, it is my feeling that it was a saddle embolus when it first became apparent.

(Testimony of Louis Clayton Allard.)

The Court: What was the saddle embolus?

A. It is this blood clot of fair size, moderate size, that flows down the aorta and lodges over the splitting, the saddle of this vessel.

The Court: Where can that saddle embolus come from? A. Where can it come from?

The Court: Yes.

A. The usual or most common site would be from the heart, from the left ventricle of the heart, or the left side of the heart.

Q. Now, Doctor, you have examined the records from the Deaconess hospital of Mr. Hennessey?

A. Yes.

Q. Do those records indicate to you whether or not the saddle embolus came from the heart?

A. There is no indication in the records of anything such as heart irregularity and so forth which would point to the heart as a definite site.

Q. In other words, in your opinion, it did not come from the heart, is that right?

A. That is not correct. I said I don't know where it came from. [420]

Q. I don't want you to say just what you think, Doctor. But here the records do not indicate it did come from the heart, is that right?

A. That's right?

Q. Where would the next most likely place be for that saddle embolus to come from?

A. The next most likely place would probably be from the pulmonary vein.

(Testimony of Louis Clayton Allard.)

Q. Have you examined the records to see if there is anything in the records to indicate whether the pulmonary vein was the source of the embolus?

A. No, sir, there is nothing to indicate the pulmonary vein.

Q. Then, where would the next source of saddle embolus or embolism in the aorta be?

A. As one gets into the more remote possibilities, it could possibly occur as a so-called paradoxical embolus which could arise from anywhere in the vein, flow through the right side of the heart and through a large patent foramenal vessel, thus avoiding the lungs, and flowing directly into the aorta.

Q. Now, Doctor, this last condition that you explained, that could actually—actually there would have to be a deformity in the heart for that to exist, actually, wouldn't there, or at least an enlargement of one of the openings in the heart somewhere?

A. Yes, an enlarged abnormal opening in the heart. [421]

Q. Would that abnormal opening show on examination, would there be indications of it?

A. If it were that large, it very likely would show some change in the contour of the heart on an X-ray, at least.

Q. Is there anything in Mr. Hennessey's medical record which would lead you to believe his heart might be in such condition as to allow that condition to happen?

(Testimony of Louis Clayton Allard.)

A. No, sir, there is not.

Q. Actually, there isn't one person in a hundred that would have a heart like that, is there, Doctor?

A. There would probably be less than that.

Q. Less than that. So, do you have any opinion at all, Doctor, as to what the source of this embolism was?

A. No, sir, nothing specific.

Q. And from your examination of Mr. Hennessey and from studying the records, then, you just would not say what caused the present condition brought about by the embolism, is that right?

A. I wouldn't say as to the site of origin.

Q. That is what we are trying to determine. I think we can all agree it was there.

A. That's right.

Q. But you would not say what the site was?

A. No, sir.

Q. It is impossible for you to determine?

A. It is impossible for me to, yes. [422]

Q. Doctor, would you say that it would be impossible to have a blow force the blood in the system—a blow struck in the shoulder, force the blood down so as to rupture the——

A. Lumen?

Q. Well, the inner lining of either the aorta or the vena cava?

A. I wouldn't say it is impossible; I would say it is highly unlikely.

Q. But it could happen, is that right?

A. Yes, sir.

(Testimony of Louis Clayton Allard.)

Q. And if either the inner lining of the vena cava or aorta was injured, there would be a tendency to have this embolus form?

A. A thrombus form.

Q. Or a thrombus form? A. Yes, sir.

The Court: Doctor, then from your examination of Mr. Hennessey and the history, would you say that the thrombus from which the embolus came was not in the aorta itself?

A. Yes.

The Court: And would you say that the thrombus from which the embolus came was not in the aorta itself?

A. Yes.

The Court: And would you say that the thrombus from which the embolus came was not in the vena cava?

A. Yes.

The Court: But it must have come from a thrombus?

A. Yes, sir. [423]

The Court: So, it came from a thrombus in some minor part of the circulatory system, would that be your opinion? At least, at some point that symptoms wouldn't be readily ascertainable?

A. It was silent.

Q. Doctor, in your examination of Mr. Hennessey, did you notice whether or not he had a spastic condition in his left leg?

A. Not at that time of my examination, but he had the contractions which I described and the

(Testimony of Louis Clayton Allard.)

changes in the tissue locally, and described to me the history that at times when he becomes tense, nervous, excited or tired that he would get spasmodic twitching or contractions of this extremity.

Q. What do you think would cause this spastic condition to exist?

A. There has been a tremendous insult to all of the tissue below the level of occlusion of the artery which has altered their responses and reactions tremendously. It would be my opinion that the spasticity is an unusually great amount of stimuli flowing up the nerves through a spinal reflex arc and contracting the working, functioning muscles in that extremity.

The Court: Do I understand that you attribute some connection between the spasticity and the fact there was an artery that was struck by the embolus on January 7th, rather than a vein?

A. Yes, sir.

The Court: Is there some connection between that?

A. The fact that this involved an artery instead of a vein? [424]

The Court: That it involved an artery instead of a vein. Explain that a little to me.

A. The artery is carrying nutrition, the materials that are going to keep the cells alive. Therefore, when the artery was occluded, the cells and tissue to which this blood vessel carries nutrition are going to change, except for those portions that pick up collateral circulation sufficiently, and die, or partially die, which is a violent change. The

(Testimony of Louis Clayton Allard.)

thrombus or embolus forming in a vein, causing a damming back of the venous blood, and the arterial blood is still flowing into these tissues, and therefore, they are receiving nourishment, but there is a back pressure on the return of the used blood from that area; and, therefore, because of these violent insults to these tissues which change nerves, arteries, muscles in there and everything in there, the skin, the responses from that are no more normal in the nerves than they are in the muscles which are contracted there.

Q. Now, Doctor, how did you determine that the block was in the artery. What did you do to determine that factor.

Mr. Angland: I will object to that as repetition. I think the Doctor has just explained that, your Honor, very thoroughly.

The Court: He has explained one of the reasons, anyway, why he says it was an artery rather than a vein, but go ahead.

A. My thinking as to why this is in the artery and not in [425] the vein is that there was a sudden onset of changes in these extremities for a few minutes, changes in the sensation which Mr. Hennessey felt, and a short while afterwards, severe pain, which, as I understand, was sufficiently severe so that his recollection of quite a period of time is quite hazy. A short while after that, the notes by Dr. Stokoe in the chart on January 7th, 1950, reveal a definite distinct pallor or whitish discoloration of this extremity, with no palpable arterial

(Testimony of Louis Clayton Allard.)

pulsations below this level; and as opposed to the type of course which would occur if the occlusion were in the vein, which would produce swelling, and the pain, if any, this early would be much milder, in fact, would probably be fairly mild, and would tend eventually to develop a bluish hue to the leg if the occlusion were high.

Mr. Hennessey: That is all.

Redirect Examination

By Mr. Angland:

A. May I ask one question, your Honor, that occurred to me here? Doctor, what is alkalosis?

A. Alkalosis is increased alkaline reaction of the blood above its normal small balanced range. I believe the P.H., and I am not at all certain of that, is 7.6, and with alkalosis there is increased alkaline reactions above that level.

Q. Does it arise by reason of holding the breath for some period of time or not? [426]

A. It can, yes.

Q. It can develop from that? A. Yes.

Mr. Hennessey: If the Court please, could I ask a question I overlooked on cross-examination?

The Court: Yes.

Recross-Examination

By Mr. Hennessey:

Q. Doctor, on the growth of this embolus, the rate of speed of growth would vary with the person and the condition of his blood, is that not true?

(Testimony of Louis Clayton Allard.)

A. Yes, sir.

Q. Do you have any opinion as to why the clot, or the saddle embolus, as you called it, would be as large as it was at that time, I mean large enough so as to block off both of the arteries?

A. Well, I think an embolus, in an artery, at least, at that time you also get a spasm of the artery. As you undoubtedly know the caliber of the artery is controlled by two opposing sets of nerves, the sympathetic and the parasympathetic nerves, with the sympathetic nerves being the contractors, and an embolus being an irritating factor, immediately associated with the lodging of this is produced an arterial spasm as a reaction to the irritation. Therefore, while the saddle embolus was lodged in the bifurcation of the aorta, while it wasn't huge enough to completely occlude both arteries, the vasospasm and the arterial spasm produced the changes [427] in both extremities.

Mr. Hennessey: That is all, thank you, Doctor.

Mr. Angland: That is all, Doctor.

(Witness Excused.)

[Title of District Court and Cause]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court in and for the District of Montana,

do hereby certify that the papers hereto annexed, and the accompanying two volumes marked Exhibit "A" on Appeal, are the originals filed in Case No. 1313, Joseph P. Hennessey, Plaintiff, vs. United States of America, Defendant, and designated by the parties as the record on appeal herein.

I further certify that Exhibits Nos. 1, 2, 4, 5, 6, 7, 10, 13, 14, 16, 17, 20, 21, 22, and 23 are the originals introduced in evidence at the trial of this cause and are part of the record on appeal herein.

I further certify that, "New England Journal of Medicine, Page 529—et seq." is also transmitted herewith as part of the record herein, pursuant to the designation by the parties in the stipulation concerning printing of the record.

Witness my hand and seal of said court this 8th day of March, 1956.

[Seal]

E. WARREN TOOLE,
Clerk as Aforesaid.

By /s/ ELIZABETH C. McKEE,
Deputy Clerk.

[Endorsed]: No. 15063. United States Court of Appeals for the Ninth Circuit. Joseph P. Hennessey, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Billings Division.

Filed: March 12, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,063

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS

To the Honorable Chief Justice and the Associate
Justices of the United States Court of Appeals
for the Ninth Circuit:

Appellant respectfully states that the following
are the points upon which he intends to rely on
appeal:

1. The Court erred in its finding number XII
to fail to further find, in addition to the finding it
made that as a direct result of the negligence of
Fay R. Livingston mentioned in Finding of Fact
XI the plaintiff sustained the personal injuries set
out in its Finding of Fact Number XIV.

2. The Court erred in its Finding of Fact Num-
ber XV that the Court "Is unable to find that the
blood clot, referred to in its Finding of Fact XIV
and the resulting damage therefrom, was caused by
any injury sustained when Fay R. Livingston fell

upon him at the airport in Pocatello, Idaho, as found above.”

3. The Court erred in failing to conclude in its “Conclusions of Law” that as a direct and proximate result of Fay Livingston’s negligent and careless acts and omissions as a servant of the United States, acting within the course and scope of his employment, the plaintiff Joseph P. Hennessey is entitled to additional special damages and damages for the injuries set forth in Court’s Finding of Fact XIV.

4. The Court erred in refusing to grant Plaintiff’s Motion for Amendment of Findings in accordance with his motion for a New Trial or Amendment of Findings.

5. The Court erred by making its order on the Motion for a New Trial or Amendment of Findings in denying Plaintiff’s Motion.

6. The Court erred in directing and entering judgment for an inadequate amount of damages considering the evidence in the case.

Dated this 27th day of April, 1956.

DOEPKER & HENNESSEY,

By /s/ M. J. DOEPKER,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed April 30, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION RELATING TO THE PRINT-
ING OF THE ORIGINAL EXHIBITS

It is hereby stipulated, subject to the approval of the United States Court of Appeals for the Ninth Circuit, that the original exhibits heretofore filed with this Court need not be printed or copied in the record, but may be referred to by the parties hereto and considered by the Court as though they were incorporated in the printed record. Any portions of said exhibits, which either party deems material, shall be printed in the brief of such party, and referred to therein.

Dated this 27th day of April, 1956.

DOEPKER & HENNESSEY,
By /s/ M. J. DOEPKER,
Attorneys for Appellant.

UNITED STATES DISTRICT
ATTORNEY FOR MONTANA,
By /s/ KREST CYR,
Attorney for Appellee.

[Endorsed]: Filed May 2, 1956.

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant,

Vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon appeal from the District Court of the United States
for the District of Montana.

DOELGER AND HENNESSEY,

Butte, Montana,

Attorneys for Plaintiff - Appellant.

FILED

No. 15063

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

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for the District of Montana.

DOEPKER AND HENNESSEY,

Butte, Montana,

Attorneys for Plaintiff - Appellant.

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APPENDIX Illustrations of Anatomy
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- Fig. 577. Showing side view, cross section male abdomen. Illustrating position of veins and arteries.
- Fig. 4. Diagrammatic sketch. Showing collateral venous return, when common iliac vein is interrupted.
- Fig. 626. Diagrammatic illustration: The venae cavae and azygos veins with their tributaries. Showing venous channels near spinal cord for collateral returns when caval system is interrupted.

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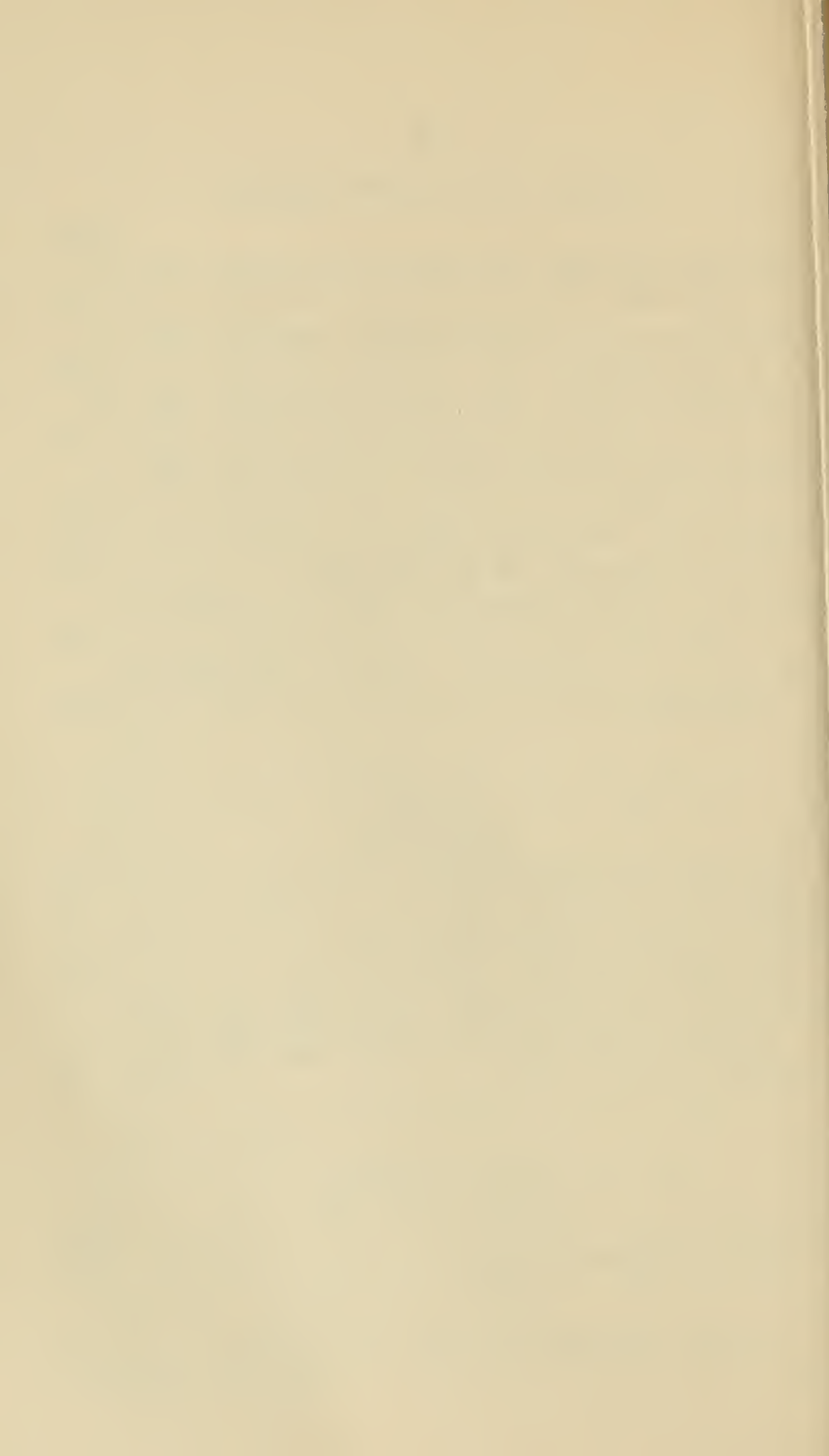
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No. 15063

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

This appeal arises because the appellant verily believes that the judgment in his favor was entirely inadequate because the evidence in the case clearly shows that he sustained a disability, because of the negligence of an employee and servant of the defendant, while the servant was acting in the scope and course of his employment by defendant, which directly and proximately resulted in injury to appellant which has permanently crippled him but which the District Court failed to find was established by the evidence in the case.

Therefore, the court limited the recovery of damages to a part only of the disability and personal injury.

The jurisdiction of the District Court was established because the case arose under the provisions of the Federal Tort Claims Act, Title 28, Section 1346 (b) U.S.C.A.

Section 1402 (b) U. S. C. A.; Section 2674 U. S. C. A. The Legislative Re-organization Act of 1946, Title IV, Part 3, Section 410 (a) second session of the 79th Congress of the United States of America.

The matter in controversy, exclusive of interest and costs exceed the sum of Three Thousand Dollars.

The Complaint appears R. 3 to 6; the Answer of the defendant appears R. 6 to 8; the Court's Findings of Fact and Conclusions of Law R. 8 to 15; the Court's Judgment appears R. 24.

This is a final judgment of the District Court.

The jurisdiction of this Court arises from the Notice of Appeal filed January 25th, 1956.

This appeal is allowed under the provisions of Section 225 of Title 28 U. S. C. A., being Judicial Code Section 128, as amended; Section 1291 Title 28 U. S. C. A.

STATEMENT OF THE CASE

The appellant, Joseph P. Hennessey, a resident of Billings, Montana, on June 2nd, 1949, prepared to make a flight from the airport of Western Air Lines at Phillips Field, near Pocatello, Idaho; he was making use of a lavatory in the men's toilet at the airport, when one, Fay R. Livingston, an employee of the United States Weather Bureau, then engaged in making weather observations in an upstairs room above and adjacent to the said men's toilet, stepped into the attic of the airport in the darkness to ascertain if he had left workmen in the darkness of the attic. He had pulled out an extension cord out of its socket as he came down the steps of the Weather Bureau's theodolite room after making a weather observation for

the defendant. He negligently failed to connect up the extension cord before stepping into a place he knew nothing about, without sufficient light; failed to look where he was going and, knowing the building he was in was unfinished, stepped between the joists on some plaster board and fell through the ceiling onto the appellant who was washing his hands in a lavatory below.

Mr. Livingston was a man five feet four inches in height and weighed between one hundred fifteen and one hundred thirty pounds.

He fell a distance of ten feet nine inches from his center of gravity above the ceiling of the wash room in a free vertical fall, striking the appellant squarely on his right shoulder and upper back, slid to the left side of his back, and then Livingston fell off the appellant approximately four feet to the concrete floor of the men's toilet sustaining nothing but a slightly bruised knee. In other words, the force of the fall was absorbed by appellant's body.

An uninterrupted fall to the concrete floor (the ceiling being twelve feet above the concrete floor) according to mathematical calculation would result in a striking force of 1840 foot pounds.

Appellant, then being a man six feet one inch in height, weighing 170 pounds, with his feet firmly on the floor, slightly bent forward, mathematically, absorbed with his body a force of 1288 foot pounds, when Livingston fell upon him.

The effect of this episode was such that, at the moment, the appellant did not appreciate fully what had happened to him; he was not crushed to the floor but was shaken and noticed a catch in his right shoulder.

However, later developments disclosed that the muscles, tissues and tendons of his shoulder and neck were hurt, producing a supra-clavicular neuritis of the right shoulder which persisted and persists; he sustained an injury to his back which apparently cleared up.

Then followed a development about which the appellant urges that it was proved that a vascular catastrophe resulted from this accident which is and was of extremely serious consequence to him. We will show that a thrombosis developed in the deep blood vessels and grew until it became so great that it suddenly blocked the blood vessels of his right and left leg as it dislodged and went down into the smaller blood vessels approximately six months later.

This development, however, the District Court found was not proven to be the proximate result of the fall of Livingston upon appellant and thereby because of the said failure of proof appellant was denied relief in the District Court for the damages which resulted, although damages for the other injuries were awarded to appellant.

Contending that this finding of the Court was clearly erroneous, under the evidence, appellant appeals to this Court for relief.

This question of the inadequacy of the damages allowed is the only matter involved in this appeal.

THE CERTIFIED EXHIBITS

We will make brief explanations of the certified original exhibits so that the Court will have a composite picture of the case:

Exhibit 1.

Consists of the original St. Vincent's Hospital record from Billings, Montana, where appellant was hospitalized from November 29th, 1949, to December 4th, 1949, because of hoarseness of thirty hours duration, swollen throat, and chest pains. This hospitalization took place five weeks before the catastrophe struck which has crippled appellant for life. A most significant portion of this record, made at a time prior to the catastrophe, *which directly connects the fall of Livingston upon appellant with his terribly crippled conditions* appears in this record:

"HE ALSO COMPLAINED OF PAIN IN HIS UPPER ABDOMEN OF SEVERAL MONTHS DURATION, WHICH WAS WORSE ON INSPIRATION AND ON BENDING FORWARD. THIS HAD BECOME MARKEDLY AGGRAVATED THE LAST FEW WEEKS BEFORE ADMISSION.

Exhibit 2.

Consists of the original Deaconess Hospital Record from Billings, Montana, where appellant was hospitalized again on January 3rd, 1950 for a recurrence of the hoarseness, swollen throat and chest pains. An upper respiratory infection which had not cleared diagnosed as a border line pneumonia. After three days he was scheduled to leave the hospital. On the morning of January 7th appellant arose to leave hospital, arrangements were made for his discharge that morning. Suddenly left leg went numb; then both legs were numb and appellant keeled over; excruciating pain, then unconsciousness; great pain

in lower back near third lumbar vertebra; whitish cyanosis of both feet an area of right foot became discolored; a vasospastic phenomenon; the right foot cleared except for small space; in midafternoon a recurrence. This was diagnosed as a saddle embolis or condition, a clot in the aorta, temporarily lodged where the aorta splits to go down either leg; evidently the largest part of clot slipped off and went down to behind left knee. Then followed leg spasms in the left leg of 5 to 10 minutes duration causing the right leg to extend involuntary; the left leg did not move. Under sedation most of the time; treatment with dicumarol, heparin-blood anti-coagulents; heavy sedation to attempt to break up spasms in the blood vessels—morphine, papaverine; injection of novacaine alongside the spinal column, gangrene—death of tissue enmasse; destruction of muscle; destruction of tissue; destruction of nerve tissue. The foregoing is a summary of the contents of Deaconess Hospital Chart Exhibit Number 2, to March 12th, 1950.

Exhibits 5 and 6.

Original St. James Hospital Records, Butte, Montana, 1934, and Selective Service Records. Principally relating to a history of pneumonia and a development of nephritis where appellant was hospitalized for several months as a youth of seventeen years resulting in a carry-over into the Selective Service Records of appellant where he was rejected for service in the armed forces because of the history of nephritis. (N.B. We comment here that all physicians testifying in this case excluded nephritis or this history as a possible cause of the vascular catastrophe.)

Exhibits 4, 13, 14, 16, 17, 20, 21, and 22.

Constitute selected pictures and sketches of the airport buildings at Phillips Field and the Weather Bureau Quarters showing the scene of the accident where Livingston fell through the ceiling above the men's toilet upon appellant.

Exhibit 7.

A bodyscope illustration of the position of the vena cava and aorta used to illustrate testimony.

Exhibits 10 and 23.

Statements of Soltero Clinic and Deaconess Hospital showing portion of expenses incurred, by appellant.

QUESTIONS INVOLVED

1. Whether or not the District Court erred in making its Finding of Fact Number XII when it failed to go further and find that as a direct and proximate result of the negligence of Fay R. Livingston mentioned in its Finding of Fact Number XI appellant sustained the personal injuries described and set out in its Finding of Fact Number XIV. (R. 12 to 14.)

This question is raised because an examination of all of the medical testimony will show, with respect to the said vascular catastrophe, that no witness except appellant's Dr. Horst had any explanation of the cause thereof or where it originated.

2. Whether or not the District Court erred in its Finding of Fact Number XV to the effect that the Court "Is unable to find that the blood clot, referred to in its Finding of Fact XIV and the resulting damage therefrom, was

caused by an injury sustained when Fay R. Livingston fell upon him at the airport in Pocatello, Idaho, as found above." (R. 14.)

This question is raised because an examination of the medical testimony will show, with respect to the said vascular catastrophe, that all medical witnesses agree that the crippled condition of the appellant was the result of the blood supply to his legs being shut off by an embolus that blocked the circulation; that all known sources of the emboli, except traumatic, were eliminated because of absence of disease and the presence of healthy lungs, healthy heart, healthy blood vessels, absence of infection sufficient to produce an embolus. Further, appellant's witness, Dr. Horst, a physician of many years experience and one who had made an exhaustive study of the problem and a careful personal examination of appellant, testified to a completely logical and reasonable explanation connecting the fall of Livingston upon appellant as the proximate, efficient and producing cause of the traumatic damage to the blood vessels which resulted in the propagation of the thrombus and dislodgment of the emboli which resulted in this damage to appellant.

3. Whether or not the District Court erred in failing to conclude in its "Conclusions of Law" that, as a direct and proximate result of Fay Livingston's negligent and careless acts and omissions, as a servant of the United States, acting within the course and scope of his employment, the appellant, Joseph P. Hennessey, is entitled to additional special damages and damages for injuries set forth in Court's Finding of Fact XIV. (R. 15.)

4. Whether or not the District Court erred in refusing

to grant appellant's Motion for Amendment of Findings, in accordance with his motion for a New Trial or Amendment of Findings. These questions are raised for the reasons heretofore explained with respect to the vascular catastrophe and the entire record showing by a preponderance of the evidence that the proximate cause of this crippled condition and disability of appellant was the fall of Livingston upon him as found in Court's Finding of Fact number IX. (R. 11.)

5. Whether or not the District Court erred by making its order on the Motion for a New Trial or Amendment of Findings in denying Appellant's Motion.

This question is raised as the legal relief appellant was entitled to for the reasons heretofore given from the facts and evidence was denied him by the District Court in its refusal to amend the findings.

6. Whether or not the District Court erred in directing and entering an inadequate amount of damages considering the evidence in the case.

This question is raised upon the evidence directed to the proximate cause of the great vascular catastrophe suffered by appellant which injuries and resulting damage were eliminated from consideration by the District Court upon an alleged failure of proof.

SPECIFICATIONS OF ERROR

The following specifications of error are all presented to this Court for review upon the record of the evidence in this case concerning the proximate cause of the great vascular catastrophe suffered by appellant, without repeating after each assignment of error.

Three witnesses, all duly licensed physicians and surgeons, testified concerning this phenomenon, one was the attending physician whose chief concern was the application of all remedies known to medical science, as far as he knew, to combat, relieve and attempt to cure the sudden devastating onslaught upon the nerves, tissues and tendons of the appellant, rather than to make an exhaustive study of the reasons for the condition; another who was called by the defendant, a young man of seven years experience, who was unable to say what caused the catastrophe, but who directed his testimony against portions of the findings made by the physician and surgeon of many years experience, who, appellant contends, gave a clearly explained and reasonable account of the entire matter, after a searching, considered study of the life history of appellant, with a careful personal examination of him and fortified by the original hospital records of appellant's history and attention to the testimony of the four physicians and surgeons who testified in the case.

This latter the District Court refused to agree with and completely disagreeing with the reasonable, credible evidence of Dr. Horst, found against the appellant on this part of the case.

We shall further allude to the specifications of error in our argument but here advise the Court that they are all based on the foregoing explanation of appellant's contentions.

I.

The District Court erred in its finding number XII, when it failed to find further, in addition to the finding it made that as a direct result of the negligence of Fay

R. Livingston, mentioned in Finding of Fact XI, the plaintiff sustained the personal injuries set out in its Finding of Fact number XIV.

Finding of Fact No. XII is as follows:

“That as the direct result of the negligence of Fay R. Livingston mentioned in Finding of Fact XI herein, the plaintiff Joseph P. Hennessey, sustained the following personal injuries:

The muscles, tissues and tendons of his shoulder and neck were hurt, producing a supra-clavicular neuritis of the right shoulder, and plaintiff continues to suffer some slight discomfiture from such condition and will in the future suffer such discomfiture. He sustained an injury to his back. The back injury cleared up. By reason of his injury plaintiff was required to incur the following expenses: Soltero Medical and Surgical Group, Billings, Montana, \$12.00 for treatment of shoulder.” (R. 13 to 14.)

Appellant says the Court erred in not finding further that:

“; as the direct result of the negligence of Fay R. Livingston, mentioned in Finding of Fact XI the plaintiff sustained the following personal injuries:

“That on or about January 7, 1950, the plaintiff suffered a blood clot or embolus in his aorta which temporarily lodged where the aorta splits to go down either leg; that thereafter the blood clot or embolus became dislodged from where it had stopped at the junction of the aorta and slipped down in the artery of the plaintiff’s left leg; that as a result of said blood clot or embolus the blood supply to plaintiff’s legs was cut off, plaintiff suffered excruciating pain in the region of the lower back and legs, and plaintiff has suffered considerable, total and permanent damage to his left leg.

District Court’s Finding of Fact Number XIV (R. 14.)

II.

The District Court erred in its Finding of Fact Number XV that:

“That as a result of all the evidence in the case and particularly medical testimony, the Court is unable to find that the blood clot, referred to in Finding of Fact XIV, and the resulting damage therefrom, was caused by any injury he sustained when Fay R. Livingston fell upon him at the airport in Pocatello, Idaho, as found above.”

FINDING OF FACT NUMBER XV. (R. 14.)

N. B. Finding of Fact Number XIV mentioned in the finding above appears directly preceding Specification of Error II and is not repeated here as it would be unnecessary repetition.

III.

The District Court erred in failing to conclude in its “Conclusions of Law” that as a direct and proximate result of Fay Livingston’s negligent and careless acts and omissions as a servant of the United States, acting within the course and scope of his employment, the plaintiff Joseph P. Hennessey is entitled to additional special damages and damages for the injuries set forth in Court’s Finding of Fact XIV.

Unimpeached credible evidence presented by appellant’s witness Dr. Horst demonstrates, beyond doubt, that the severe vascular catastrophe was the direct and proximate result of this fall of Livingston upon appellant. (R. 193, 242, 248, 284, 306, 316, 334 et seq.)

IV.

The District Court erred in refusing to grant Appellant's motion for amendment of findings in accordance with his motion for a New Trial or Amendment of Findings. (R. 16 and 17.)

Plaintiff's and appellant's Motion for New Trial and Amendment of Findings is as follows:

This Motion is set out in the Record, P. 16. The Court's Order appears (R. 17 - 23.)

To present the matter here in concise form we quote the following from the Motion:

"In the alternative plaintiff moves the Court to amend its Findings of Fact and Conclusions of Law as follows:

'To substitute Court's Finding of Fact Number XIV (above) by finding in place thereof in accordance with paragraph one, three, four, five, six and seven (unnumbered) of Plaintiff's proposed Findings of Fact and Conclusions of Law contained on pages 6, 7 and 8 thereof from plaintiff's proposed finding 13.' (R. 16.)

'To substitute plaintiff's proposed Finding of Fact (R. 16) Number 15 instead of Court's Finding of Fact Number XV. (R. 17.)

To amend Court's Conclusions of Law in accordance with the Findings of Fact as thus amended'."

WE NOW QUOTE IN FULL THE SUBSTANCE OF PARAGRAPHS ONE, THREE, FOUR, FIVE, SIX AND SEVEN (unnumbered) OF PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW CONTAINED ON PAGES 6, 7, and 8 THEREOF, FROM PLAINTIFF'S PROPOSED FINDING 13:

PLAINTIFF'S PROPOSED FINDING XIII.

1. "That as the direct result of the negligence of Fay R. Livingston mentioned in Finding of Fact Twelve herein, the plaintiff Joseph P. Hennessey, sustained the following personal injuries:

3. He sustained an injury to the deep blood vessels in the abdomen which caused a painful reaction in the right upper quadrant of his abdomen which continued from June 2nd, 1949, through January 7th, 1950, and on January 7th, 1950, plaintiff developed numbness of both feet and up both legs to his knees and he suffered severe pain around the third lumbar vertebra; the pain was excruciating and a partial whitish cyanosis of both feet developed with coldness and bilateral absent lower leg reflexes, severe tenderness about plaintiff's third lumbar spinous process. His right foot became normal in one and one-half hours leaving some residual pain in the right heel. A thrombus had formed in the deep blood vessels of the plaintiff's abdomen and a saddle embolus went down into the legs; an area of gangrene developed in plaintiff's left leg which gradually diminished. Plaintiff had a gradual improvement with the areas of gangrene but the clot having diminished the supply of blood caused a destruction of the muscle and nerve tissue of plaintiff's left leg and permanently damaged his leg, ankle and foot which produced a permanent drop foot in plaintiff's left leg. Plaintiff suffered constant excruciating pain, spasms in the blood vessels and tremendous destruction of tissue in his left leg,

ankle and foot which caused the plaintiff to suffer extreme physical and mental pain and anguish for several months subsequent to January 7th, 1950. Thereafter plaintiff made slight partial recovery of the damage to his legs, but continued to suffer extreme pain and anguish, with loss of sleep and inability to walk without support of crutches and up to the time of the trial in January 1953 the plaintiff was unable to walk without extreme pain, and with reasonable certainty his condition is permanent and no further recovery can be anticipated. All of plaintiff's injuries were directly caused by the fall of Fay R. Livingston upon him on June 2nd, 1949.

4. That on June 2nd, 1949, the plaintiff had a life expectancy of 33.42 years; that on January 15th, 1953, he had a life expectancy of 31.07 years.

5. That by reason of his injuries plaintiff was required to incur the following expenses: Deaconess Hospital, Billings, Montana, \$995.50; from January 7th to March 12th, 1950, inclusive; Soltero Medical & Surgical Group, Billings, Montana, \$12.00 for treatment of shoulder and the further sum of \$236.50 from January 7th to May 10th, 1950; \$136.00 for Physiotherapy treatments; \$240.00 convalescence quarters from March 12th to May 11th, 1950; that with reasonable certainty the plaintiff will be required to expend the sum of \$1880.00 for future hospital and medical treatment, reasonably necessary to treat his injuries sustained June 2nd, 1949.

6. That on June 2nd, 1949, plaintiff had an established business as an attorney at law in Billings, Montana, from which he could reasonably anticipate net earnings of at least \$5000.00 per year. During the year 1950 plaintiff lost 80% of his earnings in the amount of \$4000.00; in the year 1951 plaintiff lost \$3000.00 of his earnings and the further sum of \$1500.00 in the year 1952. All of the foregoing loss of earnings were directly due to his injuries sustained on June 2nd 1949.

7. That with reasonable certainty, as the direct result of his injuries sustained on June 2nd, 1949, plaintiff's earning ability has been depreciated and with reasonable certainty will be depreciated in the future. Therefore, he will lose in the future at least \$1000.00 per year during his life expectancy. The present worth of his sum being \$16,000.00."

The granting of the portion of the Motion to Amend Findings will have the following effect:

Court's Finding of Fact XV (R. 14.) See Page 13 above.

Plaintiff's proposed finding of fact 15 is as follows:

"15. That by reason of the negligent acts and omissions of defendant's servant and employee, Fay R. Livingston, the plaintiff Joseph P. Hennessey, has sustained damage because of his other physical injuries, past and future pain and suffering and loss of ability to follow important duties of his profession, in the reasonable sum of \$18,000.00."

V.

The District Court erred in making its order on the Motion for New Trial or Amendment of Findings in denying Plaintiff's Motion. (R. 17 to 23.)

The Motion and Order are set out in the appendix to this brief on account of the length thereof. The Motion appears also in R. 16 to 17.

VI.

The District Court erred in directing and entering judgment for an inadequate amount of damages considering the evidence in the case. (R. 15.)

This question arises because of the Conclusions of Law which, in effect, deny relief to appellant for the major part of his injuries.

The Conclusions of Law follow:

(omitting the conclusion as to jurisdiction.)

“II.

That as a direct and proximate result of the said negligent and careless acts and omissions of the servant of the defendant, the United States of America, namely, Fay R. Livingston, acting within the course and scope of his employment, the plaintiff, Joseph P. Hennessey, was injured as aforesaid and is entitled to judgment against the defendant, the United States of America, as follows:

(A) Special damages: Doctor, \$12.00.

(B) Damage because of injury to plaintiff's shoulder, neck and back, \$2,500.00.

III.

Let judgment be entered in favor of the plaintiff, Joseph P. Hennessey, and against the defendant, the United States of America, for the sum of Two Thousand Five Hundred Twelve and no/100ths Dollars (\$2,512.00,) (R. 15.)”

We contend that these Conclusions of Law are clearly erroneous under the evidence in this case and deny to appellant that which he is justly entitled to in the nature of recovery for his injuries.

ARGUMENT

There is no controversy between Appellant and Appellee on the District Court's Findings of Fact, except on the decision as to the cause of the severe vascular catastrophe admittedly suffered by appellant, with the resulting damages sustained by him.

The testimony of appellant, Joseph P. Hennessey, the deposition of the Weather Bureau employee, Fay R. Livingston, who fell through the ceiling of the men's lavatory upon appellant, the testimony of H. Edgar Strahl, the special agent for the Federal Bureau of Investigation, (who identified many of the original exhibits certified to this Court) are all in the record to aid the Court in its review of this case on the point of disagreement between Appellant and Appellee.

The testimony of witness Harry C. Wheeler is in the record with the introduction of the statement of expenses Deaconess Hospital—Original Exhibit 23.

Dr. Harry R. Soltero testifies concerning the neck and shoulder injuries sustained by appellant. (R. 95 to 107.) He did not go into the matter of the vascular damage.

The physicians and surgeons who testified on the subject of the controversy between appellant and appellee in this case were:

Dr. C. H. Horst,

Dr. Robert Scott Stokoe,

Dr. Louis Clayton Allard.

Observing the original exhibit Number 7, the Court will note the position of the two large blood vessels, one the vena cava, the other the aorta running down below the

diaphragm in the human body. They are immediately in front of the spinal column, the vena cava being the nearer of the two; they both bifurcate forming an inverted Y, branching into arteries and veins leading to the legs. This Court knows, in common with the members of the human race, that the aorta is the much more elastic and tougher than is the vena cava; that the blood courses rapidly downward in the aorta and moves much slower and upward in the vena cava in the process of circulation through the body.

What effect did the fall of Livingston on the appellant have on the columns of blood in these two vessels?

Quoting from an article in *The New England Journal of Medicine* alluded to in the Court's opinion and in the testimony of Dr. Horst (R. 318) we find the following:

"Mengert and Murphy have recorded intra-abdominal pressures as high as 200 mm. of mercury when patients strain voluntarily. These high intra-abdominal pressures, which accompany fixation of the diaphragm and contraction of the abdominal musculature, as in straining, lifting and jumping, must be directly reflected by sharp venous pressure elevations in the vena cava, iliac veins and then the femoropopliteal veins, in accordance with Pascal's law, which states that pressure applied to an enclosed fluid is transmitted equally in all directions and acts with equal force on equal surfaces. * * * The venous wall * * * must vary markedly from place to place in firmness of its muscular and fascial support. Any local weak point, such as a foramen ovale, would permit a bursting force to be applied to the vein wall * * *."

(Copy of *The Journal* has been certified to this Court.)

This Court certainly can and will reasonably compare the force of a voluntary straining with the tremendous force of a 120 to 130 pound man falling upon appellant for a distance ten feet nine inches from his center of gravity downward, with the unexpecting appellant bent forward in a manner which would tend to compress both aorta and vena cava among the tissues against the backbone. Beyond doubt this force, transmitted through the blood vessels downward, would strike against the cramped walls or one or other or both of these blood vessels, with reasonable probability damaging them.

Here, let us inform the Court, that one of the unfortunate circumstances which developed with the medical witnesses in this case was a disagreement which blood vessel, aorta or vena cava subsequently disclosed the thrombosis, the resulting embolus and the consequent damage to appellant.

IT ABUNDANTLY APPEARS FROM THE TESTIMONY, HOWEVER, THAT THE END RESULT, AS FAR AS THE CRIPPLING OF APPELLANT IS CONCERNED, WOULD BE THE SAME.

It most certainly is true that if the circulation of blood is stopped in the legs the damage will be the same whether it is stopped in the veins or in the arteries. Tissue will die in either case. Yet, off on this tangent, controversies developed in the case which left the appellant discomfited and denied relief.

Therefore, we respectfully request this Court to keep this truth in mind as review of this evidence is made to

determine that, which we contend, demonstrates that the learned jurist, who tried the case, made a decision which was clearly erroneous under the evidence.

For the reason that all of our Specifications of Error which have been specified above arise out of this question we will attempt to aid the Court with our reasoning in the premises and present the specifications together.

Summarizing now the evidence which is important to the decision in this case and which is the evidence of the physicians and surgeons who testified on the matter of the vascular catastrophe suffered by appellant we will start with the physician who was attending him when the casualty struck, Dr. Robert Scott Stokoe and present the:

SUMMARY OF EVIDENCE

Dr. Robert Scott Stokoe, an admittedly qualified physician and surgeon practicing in Billings, Montana, had as his patient appellant, Joseph P. Hennessey, and after examination of him late in November, 1949, admitted him to St. Vincent's Hospital, on November 29th, 1949.

He entered the hospital with the complaint of hoarseness of thirty hours duration.

A very important circumstance in this case was in addition to a complaint of chest pains, *he also complained of pain in his upper abdomen of several months duration, which was worse on inspiration and on bending forward. This had become markedly aggravated the last few weeks before admission.* (R. 132.) See also exhibit 1, St. Vincent's Hospital chart under record of complaints.

Appellant was hospitalized because of a diagnosis of acute Laryngitis. He made a complete physical examination of appellant. A previous nephritis was entered in the history. His examination disclosed a tender liver area which could be felt. Laboratory test was made, including a very sensitive liver test, which disclosed that appellant's liver was all right and within normal limits.

His urine was normal with the exception of a trace of albumen and acetone. His red blood count was mildly above normal. On account of chest pains and bronchitis, X-rays of his lungs were taken which revealed some increased markings which the radiologist felt was compatible with sinusitis or a post nasal drip. These were not taken with any serious note. He was discharged from the hospital December 4th, 1949. (R. 133.)

No disease nor trauma was found connected with his heart; nothing serious concerning his lungs; he was not suffering with nephritis.

Dr. Stokoe had the appellant as his patient again on January 3rd, 1950, when he admitted him to the Deaconess Hospital, Billings, Montana. On this occasion the doctor believed he had a borderline case of Bronchopneumonia but X-rays taken at the time revealed a normal adult chest; normal lungs, heart and the chest wall; he had a swollen throat and a slightly elevated blood pressure; there was no heart murmur; no lung abscess and his progress was satisfactory to the 6th of January, 1950. They planned to discharge him the next day and discontinued all medication except cough syrup. (R. 138 to 140.)

On the morning of January 7th, 1950, appellant collapsed with severe pain in his lower extremities. He had

awakened with numbness of both feet which progressed up both legs to his knees and he developed a severe pain around the third lumbar vertebrae.

The pain was excruciating and the doctor observed a partial Whitish cyanosis of both feet with coldness and bilateral absent lower leg reflexes, severe tenderness about his third lumbar spinous process. He responded well to morphine with atropine.

Emergency X-rays were taken of his back with a mistaken diagnosis of two old fractured transverse processes on the left which later proved not to have been injured.

There was an area on his right foot which within one and one-half hours became normal but which left some residual pain in his right heel.

His reflexes then began returning in his left foot but the discoloration persisted.

The excruciating pain markedly elevated the blood pressure but his heart was negative. Dr. Stokoe believed it to be a vasospastic phenomenon and he was treated symptomatically for a few hours.

He remained in bed and improved to about 3:30 in the afternoon when he had an acute recurrence of pain behind his left knee extending on down to his great toe. (R. 142-143.)

He had a marked vessel spasm which was because of a saddle embolus or condition, a clot, in the aorta where it splits to go down either leg; evidently the larger portion slipped off and went down behind his left knee.

There was obviously no blood coming into the legs or, if any, a very minimal amount. Witness did not think at first it was a clot in the aorta but subsequently decided

it had to be a saddle embolus at the bifurcation which had slipped off and had gone down into the leg further.

In judging the exact condition, the whiteness and coldness of the leg, the pain in the back would go along with a saddle embolus, the pain in the area of the third lumbar vertebrae or lower back, indicated the same but there was nothing palpable, feelable evidence of the exact location of this embolus at this time. (R. 144-145.)

On the 7th, 8th or 9th of January, 1950, in the midst of medical struggle against the effects of the vascular catastrophe that had struck, Dr. Stokoe could not find anything direct or palpable which was evidence as to exactly which blood vessel the embolus was in. (R. 145.) His deductions were from the symptoms; an embolus in an artery in the space behind the knee is in very deep and it is extremely difficult to feel that artery on some people, even when everything is normal. You just barely can get a pulsation behind the knee. (R. 145.) Dr. Stokoe started immediately to treat the condition, injecting the sympathetic nerves to the left side of the spine; giving appellant anticoagulants to prevent further blood clot formation and to help dissolve the clot; gave heavy sedation to attempt to break the spasms in the blood vessels he used heparin and dicumarol to stop further clotting; papaverine and morphine and a barbiturate and did everything in his knowledge from medical science to contest the condition.

Nevertheless, because of the lack of blood supply to the leg there was destruction of tissue, destruction of muscle, destruction of nerve tissue leaving permanent residuals in his leg, ankle and foot including a drop foot. (R. 149.)

The last dose of anticoagulant was given February 4th, 1950.

Subsequently, before he left the hospital an X ray examination was made for determining whether there was any pathology in the heart, the aorta and lungs also diaphragm and X rays of the legs.

The X rays of the heart, lungs, and diaphragm were all negative. There was no evidence of disease which would be responsible for the embolus. (R. 151-152.)

Dr. Stokoe then related the known sources of blood clots from medical science.

They must arise within the vascular tree. Small clots can get thru the heart between the right and left side in extremely rare cases where there is a defect or opening in the heart which is congenital called a foramen ovale where the clot gets through from one auricle to the other shunting the lungs. There was no such condition in the appellant's heart.

Another source of embolus would be the blood vessels of the lungs themselves, that is, the pulmonary veins or contributor to the pulmonary veins.

The next source of embolus would be from the valves of the heart that is the left side of the heart or from the wall of the heart muscle.

The next source of embolus would be the wall of the aorta.

The embolus must arise from within the lining of the blood vessel.

As to the walls of the blood vessel it can arise from infection in the wall of the blood vessel or from something eroding through into the inside of the blood vessel, an infection and it can arise from injury to the lining of the blood vessel.

Dr. Stokoe rules out infection.

He ruled out any conditions in the heart. There was no heart disease.

There was no condition in the lung area which would cause an embolus.

Doctors name a blood clot that adheres to the wall of a blood vessel a thrombus.

Where a thrombus was attached to the wall of a blood vessel while a patient was resting in bed, it can either stay there as it was before, or under circumstances of bed rest with changes in the blood vessel accompanying bed rest, and the changes in pressures, the thrombus could break off and go on down the vessel as an embolism.

A thrombus due to one cause might form at a different rate of speed than a thrombus due to another because it depends upon how much injury there is to the blood vessel, or the wall, by the infection or injury. It depends upon the clotting mechanism of the patient, it depends upon the rate of flow of the blood. There are many factors which affect the speed of forming thrombi and how it acts.

Dr. Stokoe then explains the Bodyscope. Plaintiff's exhibit 7.

Dr. Stokoe then establishes that he found an embolus in the patient, the appellant, on the 7th day of January, 1950. (R. 150 to 162.)

Then Dr. Stokoe was asked what the source of the embolus in his opinion was. His reply is as follows:

"I can't state where the embolus arose; it is impossible to state where it arose by anything short of an autopsy; I couldn't say where it arose. When we

do eliminate the heart and we do eliminate the lungs, we can simply give an opinion that it may have arisen from the wall of the aorta as the only other remaining source, providing we also rule out a patent foramen ovale, which we previously discussed, through which an embolus could conceivably get from the venous side of the body to the arterial side. It is extremely doubtful, and it is extremely rare that an embolus gets from the venous side to the arterial side through this opening; so if we rule out that as well, we know that it had to come from the arterial side, from the lung, the heart, or the aorta, as the only remaining sources.

To the best of our ability we have ruled out the lung, to the best of our ability we have ruled out the heart. I still cannot say that this came from the aorta. It is reasonable that it may have come from the aorta." (R. 163 and 164.)

An embolus comes from a thrombus, the thrombus being a clot, or later on, the residuals of the clot inside the lumen of the vessel. This thrombus itself, or its end product can break off and form an embolus, or a new thrombus can form over an old thrombus and the new thrombus break off and become an embolus.

Dr. Stokoe says that in the case of the appellant there was a thrombus that changed from a thrombus to an embolus in this case.

Dr. Stokoe agrees that Livingston falling upon the appellant would cause extra pressure to be built up in the aorta momentarily but in final analysis could not say where the embolus arose, agreeing that a tear, either minimal or large could happen in the wall of the aorta. Did it happen he doesn't know. It is possible that it did. (R. 166 to 168.)

Concluding his testimony Dr. Stokoe eliminates in his opinion the history of nephritis or the fact of nephritis as well as other infections in the case of the appellant as the source of the embolus which caused the damage. (R. 180 to 187.)

DR. LOUIS CLAYTON ALLARD

Called by the defendant, resides at Billings, Montana, admittedly qualified as a physician and surgeon, specializing in orthopedics and had been engaged in the practice of his profession for seven years at the time of the trial.

He had made a study of formation of thrombosis in blood vessels. Made a drawing showing a cross section of a blood vessel with the outer walls, the muscle walls, the lining of the vessel and the lumen or hole in the center.

If you had a small clot or a breaking or tearing of that blood vessel, in all probability a thrombus would develop.

The thrombus develops because of small changes in the wall, any irregularity, the cells, platelets, blood cells, begin to pile up, you might say catch on this roughened surface and continue to catch and pile up on this until the thrombus has gone as far as possible, which is the filling of the blood vessel completely.

Witness, in his experience has never seen a completely filled vena cava, however, as an estimate, depending on the condition that gave rise to the thrombus, he would say that anywhere from several days to ten days time at the most the vessel would be occluded with the blocking off completed. Theoretically the aorta could occlude as well as the vena cava could occlude but witness has never seen either one occlude.

The occlusion of the vena cava at and below the level of the body of the second lumbar vertebra would ultimately produce an occlusion also of the lumba spine veins, which is a portion of the venous drainage of the spinal canal. This back flow would produce increasing pressure on the nerves of the cauda equina (horses tail) which are the nerve trunks that still remain inside of the spinal canal after having left the termination of the spinal cord which usually is at the level of the second lumbar veterbra. Witness then describes how the nerve trunks come out and enervate various portions of the body. A vein or veins being occluded would produce some swelling within the spinal canal and cause increasing pressure on the nerve trunks.

Assuming a partial filling of the lumen of the vena cava, as long as the thrombus was partial it would not have any effect on the lower extremities, however that thrombus would continue to build up until complete occlusion thereby producing a damming back of the drainage of the blood from the veins out of the lower extremities and most certainly cause severe swelling of the lower extremities.

It is difficult to make an accurate statement as to the rate a thrombus will build up. However they do not attach to the wall and build a partial thrombus. "I don't have any accurate figures. However, it would be my estimation again that it would cover a period of two weeks time for a thrombus to develop and occlude the vessel. (R. 385 to 393).

On January 13th 1953, witness examined plaintiff and appellant Joseph P. Hennessey. Made a complete physical

examination. He elicited the history from him and examined his heart, lungs, blood pressure, pulse rate, and examined his lower extremities.

He found the lower extremities of equal length; an atrophy of the lower calf and foot on the left, with change in the consistency and a brownish discoloration of the left foot.

The neutral or most relaxed position of the foot was at an angle of 145 degrees, which, in our measurements assumes that when the foot is parallel with the foreleg it would be 180 degrees; at a right angle 90 degrees. The left foot could be forced up to or dorsiflexed upward to 135 degrees and plantarian flexed or moved downward to 160 degrees. There was a mild degree of limitation of inversion of the foot—rotating it inward, and moderate limitation of eversion of the foot. The contour of the right leg appeared normal, with full range of motion at the ankle. The arterial pulsations of the ankle and foot regions, both sides, were markedly diminished to palpation. Tests of his sensation by means of knife point revealed marked increased sensitivity of the entire left foot below the ankle, most marked on the sole of the foot. Also increased sensation of the toes of the right foot.

Dr. Allard reviewed the Deaconess Hospital record and took a history from appellant and it was his impression that Mr. Hennessey suffered an occlusion—first of all suffered a saddle embolus at the bifurcation of the aorta and that on the same day it slipped off the saddle and lodged in the arteries of the left lower extremity producing an occlusion of the arterial supply there.

As to the source of the embolus in this particular case there is nothing specific to indicate any definite site of origin and nothing to give us a clue or guide as to this area.

A thrombus that developed 20 years previously or five years old or six months old would have organized or would have changed to scar tissue and by that time would be an integral part of the blood vessel, rather than an inert clot.

Heparin and dicumarol are anti-coagulants; they lower the prothrombin time, or in other words, they lower the clotting ability of the blood in order to prevent propagation of the thrombus and that is its effect, the prevention of further coagulation. They do not dissolve the embolus or scar tissue that has fallen off.

If you had an occlusion of the vena cava an auxiliary circulation or colateral circulation would principally be through the superficial walls of the abdomen and are easily recognized. He did not find any condition of that kind in appellant.

Doctor Allard checked the shoulder and back and relates his findings. (These are not in issue and we pass them).

He repeats that he does not know nor could he tell from the history or records of the Deaconess Hospital where the source of the saddle embolus was.

He does not believe that a severe blow on the shoulder where the blood was compressed down and distend the aorta could start a thrombus there. An injury to the inner lining of the aorta would cause a thrombus to form. (R. 393 to 405.)

He never observed a case where there was a thrombus in the aorta itself.

The evidence of a thrombus, grown to occlusion, because of the shutting off of the blood supply, the collateral supply will not develop as rapidly there would be excruciating pain; there would be, first of all a conspicuous pallor, a very white, dead appearance of the skin, a whitish and ultimately the sloughy bluish discoloration which precedes gangrene, and ultimately gangrene, assuming that a patient survived long enough to develop gangrene and I don't believe that a patient would live long enough to develop gangrene if the aorta were occluded.

He then responds to question from the Court, excluding the known sources of an embolus on the arterial side, the heart, the pulmonary vein the paradoxical patent foramen ovale.

He has no idea from the study of the case and the records which he reviewed where the embolus came from.

He would not say that it was impossible to have a blow struck in the shoulder and force the blood down to rupture the inner lining of the blood vessel but he would say it was highly unlikely.

But it could happen.

There was an embolus but he cannot say where the source was. (R. 406 to 412.)

He would say that the thrombus from which the embolus came was not in the aorta itself nor in the vena cava itself but it came from a thrombus somewhere.

At the time of his examination, Mr. Hennessey did not have a spastic condition in his left leg but he had the

contractions which were described and the changes in the tissue locally and spasmodic twitchings or contractions of the left leg were described to him.

In Dr. Allard's opinion the cause of the spastic condition was that there had been a tremendous insult to all of the tissue below the level of the occlusion of the artery which had altered their responses and reactions tremendously. It was his opinion that the spasticity is an unusually great amount of stimuli flowing up the nerves through a spinal reflex arc and contracting the working, functioning muscles in that extremity. He attributed some connection between the spasticity and the fact that there was an artery struck by the embolus on January 7th rather than a vein.

An artery is carrying nutrition, the materials are going to keep the cells alive. Therefore, when an artery is occluded, the cells and tissue to which the blood vessel carry nutrition are going to change, except for those portions that pick up collateral circulation sufficiently; they die or partially die, which is a violent change. The thrombus or embolus forming in a vein, causing a damming back of the venous blood, and the arterial blood is still flowing into these tissues, therefore they are receiving nourishment but there is a back pressure on the return of the used blood from that area; and therefore, because of these violent insults to these tissues which changes nerves, arteries, muscles in there and everything in there, the skin, the responses from that are no more normal in the nerves than they are in the muscles which are contracted there.

His thinking as to why this is an artery and not in a

vein is that there was a sudden onset of changes in these extremities for a few minutes, changes in the sensation which Mr. Hennessey felt and a short while afterwards severe pain, which, as he understood was sufficiently severe that his recollection of quite a period of time was quite hazy. A short while after that Dr. Stokoe's notes reveal a definite distinct pallor or whitish discoloration of this extremity, with no palpable arterial pulsations below this level. Opposed to the type of course which occur if the occlusion were in the vein, which would produce swelling, and the pain, if any this early would be much milder, in fact would probably be fairly mild and would tend to eventually develop a bluish hue to the leg if the occlusion were high.

The growth of the thrombus would vary with the person and condition of the blood. As to why the embolus was as large as it was, large enough to block off both right and left arteries he thought an embolus in an artery, at least at that time you also get a spasm of the artery. The caliber of the artery is controlled by two opposing sets of nerves, the sympathetic and the parasympathetic nerves, with the sympathetic nerves being the contractors and an embolus, being an irritating factor, immediately associated with the lodging of this produced an arterial spasm as a reaction to the irritation.

Therefore, while the saddle embolus was lodged in the bifurcation of the aorta, while it wasn't huge enough to completely occlude both arteries, the vasospasm and the arterial spasm produces the changes in both extremities. (R. 415.)

DR. C. H. HORST

An admittedly qualified physician and surgeon, residing at Butte, Montana, has been following his profession for about fifty years. He is a graduate of John Hopkins Medical School, spent a year in John Hopkins Hospital as an intern; spent a year at the Montana State Insane Asylum, afterwards was in charge of the City Hospital at Butte, Montana, for five years; Later went into general practice; in 1900 took a course in pathology at Boston, Massachusetts and he has made frequent trips to New York to see good surgeons operate and to the Mayo clinic innumerable times to look on with patients.

He has studied the question of thrombosis in blood vessels and has had quite a good deal of experience.

He previously met the appellant and made a complete physical examination of him.

For a study of the facts of the case, he had the patient, took his history and the history consisted of carrying Mr. Hennessey from the time he began to get sick until he reached his present state, and he went into his family history and reviewed the history in relation to past accidents that he had sustained; then Doctor made a careful examination of his history regarding this man that fell on him; then made his own examination of the plaintiff and made his conclusions on the case.

During his study of the case, he had the benefit of a study of the Deaconess Hospital Record, exhibit Number 2 and also a study of St. James Hospital Record being the case where as a young man appellant had nephritis. Exhibit 5. (R. 193 to 197.)

On the day of the examination he reviewed the St. Vincent Hospital Record Exhibit 1-A the laryngitis episode Nov. 29th to December 4th, 1949 a few weeks before the catastrophe. (R. 197.)

He saw Mr. Hennessey twice. He came in one day and told him about his case and was examined. Two or three weeks later on January 10th 1953 he gave him a further examination, took his history and studied the case and reported the case afterwards and reviewed all of his history as it was given. (On page 200 et seq the doctor relates the history in detail; it consists of six pages then subsequently relates further the substance of his examination continuing with great detail to his conclusion (R. 197 to 228.) We respectfully invite a review of this by the Court.

Doctor found from his examination that appellant had a lame leg, the calves of the legs were painful; his chest was normal; the lungs were normal and breath sounds clear with no rales or noises in chest; there were no friction rubs both right and left lungs normal; the heart was of normal size, the pulse was regular; blood pressure normal 120 over 80; the abdomen was apparently normal, (R. 212 to 214.)

On the neurological examination the knee jerks, left, were very responsive and very active and, graded on a rule of four plus maximum, it was three plus. Which is very important. The right knee jerk was moderately active, it was two plus. There was no sensory disturbance although in the course of the examination patient's foot jerked convulsively at one time completely involuntary for a few seconds. Deep pressure on the middle calves behind were very painful. There was no change or hard places

in the artery that extends from the groin to the knee—the femoral artery. He got the pulse up here (indicating). The artery wall was normal. The popliteal artery in the space behind the knee, the lower part of the femoral artery which goes into the tibial artery in the leg, which is a very important artery to feel, which will come up in this case, which is the artery on the back of the foot, the dorsalis pedis artery, was felt and it pulsated and it was normal and there was no thickening of the artery. There was no thickening of any arteries to indicate that he had an arterio-sclerotic condition.

Reviewing the history, the examinations, the various hospital records, the study of the case by Dr. Horst, he concluded that Mr. Joseph P. Hennessey, the appellant has had a thrombus of his inferior vena cava, that he has suffered from emboli to his spinal cord causing anoxemia and thrombosis to some vessels in the spinal cord, resulting in disturbed spinal reflexes.

That this condition was caused by the man falling on him in the Pocatello Airport on the date specified here, June 2nd, 1949.

He makes explanation of his diagnosis and conclusion as follows:

The crux of the question where the embolus started? Was it on the arterial side or was it from the venous side?

Ordinarily, all emboli, most of the emboli, do come down from the arterial side but this is an unusual case and the emboli, in my opinion, is here on the venous side at the junction of the vena cava and iliac veins. It formed right there and it formed as a result of this accident.

Now, the history shows that the man first had a pain in his left leg when he got up out of bed on January 7th, 1950, and the leg was struck numb and then afterwards when he went into the bathroom and came out got a terrific pain and the pain then developed in his right leg.

The question is how did the thrombus develop here?

That thrombus is an intravascular affair which develops within the vessel itself, and, of course there has to be something extraordinary happen to have the blood coagulate in the vein, because none of the blood in a normal individual does coagulate in a vein or artery.

So in order to explain that, when this man fell and his body struck Mr. Hennessey on the shoulder, he hit him on his right shoulder, and he was unprepared for it and, of course, it caused a distention of all these vessels, and, of course, the vessels can stand just so much pressure, and they will get a crack in the lining which is called the intima, or they get multiple cracks in it or it may be in this place, contusions because when the force of the body falling on Mr. Hennessey was transmitted through his body, it caused a congestion or distention of all of these vessels and veins. Alright. So, if a vessel has a crack in it or it has a multiple contusion in it to cause the intima to split from the wall in the intima come a ferment. It is called thromboplastin. So, the moment that the crack or contusion develops, then the blood—certain elements of the blood go to seal that condition in the vein that is involved.

Now, those blood elements that go to seal the injured vessel, the principal ones are platelets, thrombocytes and leukocytes, or thrombolysins and are sealed by the throm-

boplastin. So, that is the manner in which the thrombus developed and that is how it happened to be here.

Now, then, in my opinion, that is the way I have worked it out. It is what they call a bland thrombus and it sticks on the wall of the vessels.

Now, in order to explain this thing, his blood goes up and I say that the thrombus went down and that is the difference. As it went down that first part of it went here on the left iliac vein, and then afterwards a portion of it went down on the other side.

Dr. Horst then introduced a case from a book which was written by a great English Surgeon and the book is called "Applied Anatomy". It was published first in 1883 and there have been frequent editions of it.

He introduced this history to explain why that thrombus was on the vena cava and why it split and takes portions of it from the history to explain it. This is the history:

"As a young man Dr. Pollock won the University 120 yard hurdle race in sixteen seconds, making a record. He held his breath throughout the race and collapsed when the tape was passed. Holding the breath dams the blood back in the great veins. The heart and pulsating muscles in such a race must force the blood onwards into the great venous trunks, with the result that the inferior vena cava becomes over distended, damaged, perhaps thrombosed, and then finally occluded generally. The veins leading from the groin to the axilla at best become extended and varicose and thus taking the place of the inferior vena cava.

Now, the reason—throughout his life Dr. Pollock remained an invalid and had to wear elastic supports, the

renal veins were also occluded, but communication between the renal and subperitoneal veins opened up, the kidneys, however never working as in health."

Now, Mr. Hennessey had this body fall on him 120 pounds, from eight to ten feet above him and I conclude that these veins became terribly distended by the pressure of this man falling on his shoulder and back.

The aorta, being a very strong, powerful vessel, the least to withstand this pressure would be the vena cava. The vena cava was completely full of blood at the time; The pressure was so great that it interfered, causing a crack in the intima, it caused a general contusion of the lining of the lower portion of the vena cava, including a portion of the upper portion of each of the iliac veins, so, when these platelets and thrombocytes went from the blood to seal that injury it built up these lymphocytes and leukocytes that gradually built up until he had a thrombus that occupied the bifurcation of this vena cava and some of the clot went in the left iliac vein and some in the right and when that boy got out of bed those clots broke loose and that explains why he had a thrombus and why he had this subsequent trouble in his leg. (R. 228 to 232.)

If he had a thrombosis on the arterial side, it couldn't get into these veins because as these vessels go down they divide and subdivide and finally get into little plexuses or capillaries, a big thrombus couldn't get through and a venous thrombus in the vena cava could not come down from the arterial circulation. It couldn't be explained and neither could I explain the formation of the clot on the venous side unless I knew about the pathology there.

Appellant had an injury to his vena cava caused by the man who fell upon him and nature tried to cure it by piling up the proper cells that went to seal it.

Dr. Horst then relates from the hospital record how the attending physician and the defendant's witness concluded that it was an embolus that arose from the arterial side and shows how emboli arise on the arterial side.

They come from the heart which has to have a disease and a condition called endocarditis where little deposits pile up in the heart become big and very fragile and they liberate when the heart beats, get into the blood stream, come into the kidney and into the spleen or they might go into the legs.

In case the aorta was injured, it has a very rapid flow of blood and if the vessels in the aorta crack you could likewise get a deposit of thrombocytes or platelets and leukocytes. They could form there, but you see, the blood flows there so quickly it would be wiped off and become a embolus.

Sometimes if it sticks on there it organizes and forms walls of tissue, connective tissue. Cells grow in there and establish it. It is a heavy layer. If an embolus gets loose in the arterial system it either goes down or up to the brain. Dr. Horst then explains the phenomenon of post operative embolism. (R. 234 - 235.)

Surgeons take and put a string around this vena cava and tie it right off and then where does the blood go? It has to go through collateral vessels. Some of these vessels go through, and are continued up into the chest. Your vessels, they are very superficial, they are in the walls

of the abdomen and yet others will go around the veins, the azygos veins they are veins that go alongside the vena cava and make that communication; then there are veins within the vertebral column itself that conduct blood up and astonishing as it may seem, they do just exactly as what this man said. Dr. Pollock lived a long time, but he was incapacitated, but the collateral circulation was established.

Now, that is my idea of this. Now, you can't explain, nobody can tell where the thrombus came from when they think only in terms of the arterial system because it don't work that way. You can't explain it but you do know this that he did have a thrombus and so his leg was injured in it and now he has pain in that leg.

It was a bland thrombus; it had formed slowly for seven months and when Mr. Hennessey got out of bed the pressure of standing erect came down that the formed thrombus loosened and split at the bifurcation of the vena cava and that part of it went down into each leg or iliac veins.

The foot is very difficult to explain because it is paining all the time and still he has got the interference with circulation, so, I think a portion of this thrombus is gone in the leg and that he has a collateral circulation in there now. (R. 236 and 237.)

How could the blood get through if both iliac veins were blocked with the thrombus, answering I will say that as soon as the patient was found to be in a critical condition they immediately gave him heparin and dicumarol and they worked with remarkable results because the right leg cleared up very quickly whereas the left didn't but I

think that is why the man is living today that they used those anticoagulants to free the passage.

Now this clot, this thrombus was right here on the lower end of his vena cava and therefore, when it moved down, it cut off some of those little thrombosed veins and it caused emboli from the thrombus to go back and lodge in the gray matter of the spinal cord, which interfered with certain pyramidal nerves that control the lower nerves, the lower motor neurons—it cut the lower motor neurons off from the upper motor neurons which control the lower motor neurons. Therefore, when the reflexes were tried, they were excessive, they had no inhibition from the brain by the way of the pyramidal tracts and so the consequence was that when I tapped him on the left quadriceps ligament, it was very active, and then further it explained why that leg went into real convulsions.

The history shows that when Mr. Hennessey was in the hospital, his left leg would go into these contractions and his right leg would shoot out against the foot board. The reason for that was that the small thrombi kept invading the spinal canal through these little veins that are even with and attached to the original thrombus in the lower portion of the vena cava. That explains the origin of the embolus from the thrombus in the vena cava.

When those little emboli went into the spinal cord they didn't involve the whole cord, they involved a certain portion of it and they destroyed certain reflexes. That explains Mr. Hennessey's activity of his legs. Then again, they destroyed some of the anterior horn cells that supply the muscles with tonic reflexes, because some of his muscles are partially paralyzed. That is why he has a

paralyzed leg from where the thrombus formed. (R. 238 to 241.)

Appellant's testimony shows that in 1947 he rolled over his automobile and sustained an injury to his shoulder which apparently was cured long before the airport episode.

On cross examination the doctor was asked about this automobile accident and explained that this type of injury, the car rolling over was not to be compared to the airport injury and the witness did not feel that it could have been in any way responsible for his subsequent condition after the airport injury.

He was asked to compare the story of Dr. Pollock related by Dr. Treves in the book with the appellant's case. Explaining, that when Dr. Pollock ran and held his breath he developed a great pressure in his vessels and Mr. Hennessey had a like great pressure in his vessels when the man fell upon him. Doctor Horst explains the weight of a man of one hundred twenty pound "they are the heaviest things I ever saw" when they fall with a greater weight than 120 pounds. When the force came down, it dialated all the lungs, the lungs came down, the diaphragm came down and the intestines came down. That contused the interior of this vessel and split it. The pressure lasted only a few seconds. It would cause the aorta to expand too.

If the two vessels are considered, the aorta and vena cava were both distended with blood and a big pressure put upon them—the vena cava would contuse or split before the aorta because it is a much more stronger vessel (R. 247.) The vena cava would give first.

The blood vessel has to split somewhere; it has to have an injury, so that serum from the tissues has to exude, a thromboplastin and this attracts to it the blood cells from the blood and then they go over this rupture in the vena cava and seal it off, exactly as when you have an injury to the skin of your hand. There is a fibrinous exudate and the next thing if it does not become infected you get a scab. That is the process you have to go through to form a thrombus in the vena cava. (R. 251.)

The aorta has much more flexibility but the vena cava has a limited amount of expansion.

The smaller arteries and veins would not break more readily because they are small imbedded in tissues and the pressure exerts in the larger vessels.

Dr. Horst then explains the left iliac vein and the common iliac vein goes from the bifurcation of the vena cava; the left goes to the left and then down; the right goes obliquely down, more direct by far than the left does which is responsible for the obstruction to the pressure that comes down

The vessels run close together and the aorta being a strong powerful vessel pressed in on the common iliac vein.

The emboli in this case formed in the vena cava; they don't come from anywhere else and in this case it took seven months to build up and it was quite a clot in there. The history shows that the clot couldn't go up. It was attached to the walls. Then, when he was in bed four days, it loosened up. In the meantime the blood could have gone along side the clot and as it was a very heavy clot it had

to go somewhere. It broke off and went right first and left secondly.

As to the complete occlusion of the vena cava it depends on the individual, the extent of the tears in the intima of the blood vessels and the amount of thromboplastin thrown out in the vena cava and furnished by the platelets and corpuscles. In this case the man did know the thrombus was forming. It was in this big vein and did not give off any sensation.

There was the record of the right upper quadrant abdominal pains which directly connect up the injury and the tragedy.

It didn't say "hello" until January 7th, 1950, because the thrombus was not developed completely to obstruct the vena cava.

In response to a query by the court the witness said concerning the embolus ordinarily following the blood stream: It depends where it comes from. If it appears in the vena side it is difficult to explain because the blood flows up, it doesn't flow down but Hennessey's, when it formed was very very heavy. It involved the whole lower vena cava to some extent and the right and left iliac vein and after seven months was heavy and was attached to the walls. When he was in the hospital it loosened and being heavy enough it gravitated down and choked the veins off.

If it was a little thrombus it could be carried up and would lodge in the lungs.

This thrombus on the venous side is called a bland thrombus and is not so highly organized.

The hard or swollen substances in the abdomen that would crush against the vena cava is the artery full of

blood crushing against the left iliac vein in front of the back bone. It is the likeliest thing in this case. There is nothing else in this case to form that thrombus.

None of the other doctors testifying could give you the source of the embolus. (R. 268.)

As the thrombus developed in the vena cava there were collateral or ancillary veins that take over but in the Hennessey case it didn't show on the surface of the body.

If it develops long enough, that is to say if cells had grown into it, the thrombus, and it had attached itself firmly this collateral circulation would have been established; it was in the process of formation but the veins hadn't become distended enough or the collateral circulation hadn't been established enough to see it on the surface of the body.

The collateral circulation consists of veins that not only extend through the walls of the abdomen but they likewise develop on the Azygos veins that run along side the vena cava and they also drain through the spinal cord.

These veins would not be apparent to the naked eye unless the occlusion was complete as it was in that runner but the blood was certainly circulating along side that thrombus in the vena cava right up until the trouble happened. It was going on the side of it and it wasn't a complete occlusion.

I am of the opinion that the vena cava was partially obstructed up to the three or four inches in length but all the blood got through. There were no symptoms of an occlusion until the time that it happened in the hospital.

I looked all through the literature and Dr. Pollock's history was found in numerous articles. I have attended many

clinics and I have never seen anybody describe the length of time it takes to occlude the vessel.

A Thrombus becomes a part of the wall of the blood vessel providing it is organized and cells grow into it but if it sticks on there by reason of thromboplastin, it is not securely attached to the wall and therefore is more liable to get into the circulation one way or the other. If it was a little thrombus there it could be swept up but in this case it was a heavy thrombus. I tell you why it was: Look at the damage it caused. It was so large that it slipped against the flow of blood. (R. 273.)

You asked if Heparin would dissolve the embolus. The right leg was involved only twenty-four hours. The whole damage was in the left leg and has not stopped yet.

Does heparin dissolve emboli? It has that effect. When they give it it clears the blood vessel walls as it did here. In this case the thrombus was attached to the wall very frailly without scar tissue and wasn't with scar tissue.

Because of the contusion of the wall of the vena cava was so great the thrombus was extensive it involved not only the lower two-thirds of the vena cava but the right and left iliac veins.

Dicumarol that comes from rotten clover and sheep men found there sheep were bleeding to death. It will render the blood fluid and take away the prothrombin element. It helps dissolve and loosen up the clots. (R. 276 - 277.)

The embolus in this case went into the spinal cord because when this thrombus slipped it must have occluded the entrance of the veins that came from the spinal cord because when it went down it had to, so then, it cut that off,

that vein off, which caused congestion in the spinal cord resulting in damage to the spinal cord which explains appellant's spastic leg. (R. 279.)

The occlusion must have been below the spinal cord. The spinal cord is within the spinal canal. There is a plexus of veins within the spinal cord which are very complex. When these little lumbar veins connected with the Plexus veins that surround the horses tail, because these are big nerves that come off of that end of the spinal cord and those emboli got in that plexus of veins and ascended and got into the spinal cord itself. It wouldn't hurt the nerve at all; if it went there it wouldn't go into the nerve but it enters a plexus of veins surrounding the cord. When it gets into the cord it destroys certain nerve tracts.

The tract it disturbs is the tract of connecting nerves which connect the upper motor tract with the lower motor tract; and that wasn't a very extensive lesion and the left leg became spastic. The upper motor neuron is in tact. It controls flexion and the lower motor neuron. Appellant has lost his reflex below and he had the symptom of his foot sticking out.

If the emboli obstruct those veins it interferes with the intervenous circulation, nerve cells die and certain of this man's muscles are partially paralyzed. This is the condition of appellant and he wouldn't have the condition of his left leg if it hadn't happened.

Otherwise he would have a good leg.

He has got a leg partially paralyzed and it is hyper-active; the tone of the muscles is just hyper-active, it is spastic. That means that all the sensory impulses from the leg and foot go up and are turned right back without

any control because of the destruction of the connecting neurons within the spinal cord. (R. 282.)

Dr. Horst rules out the condition of nephritis. (R. 285.)

Concerning the episode of Dr. Pollock, comparing the blood vessels in the two men the witness relates that Pollock was about 21 years of age while Hennessey is 36 years of age and his arteries are a little bit older but the younger man had the worst condition that developed because most of his vena cava was involved. (R. 303.)

The court here takes a very unusual position. He is asking the doctor to find what is practically an exact case from the medical literature as a condition of proof. (R. 303 to 305.)

Later the witness called the attention of the court to a case in the December, 1940 issue "Surgery, Gynecology and Obstetrics with International abstracts of Surgery" for the purpose of demonstrating the reasonableness of his diagnosis in the Hennessey case. (R. 317 to 323.) With further explanation of the damage in the spinal cord the witness relates that when the clot moved it occluded the opening of these small veins into the vena cava and in this disturbance those clots got into the complex venous plexes that surround the spinal canal and destroyed some of the anterior horn cells. (R. 342.)

He explained that this plexus of veins surround the spinal cord from the base of the brain to the coccyx.

COMMENT

A resume of the testimony of the three doctors will certainly convince the Court that Dr. Horst is the only medical witness who completely gave the District Court a reasonable, intelligent and conclusive analysis of the facts of this case.

The attending physician, Dr. Stokoe, was principally concerned with the treatment of the catastrophe which so suddenly appeared and he was not able to find a source of the damage, which admittedly arises by virtue of the blood clot and the consequent interruption of the circulation.

The testimony of Dr. Allard shows on its face that it was based on conjecture and speculation as far as the formation of a thrombus or blood clot was concerned. He shows no text or medical authority to back up his statements and his testimony is always an estimation or presumption.

In this state of this record we urge that there is no medical testimony in the case that arises to the dignity of conflict with Dr. Horst's scholarly and extremely reasonable diagnosis and conclusions.

To sum up the two doctors, beside Dr. Horst, tell the Court "I don't know" Dr. Horst on the contrary gives full explanation, based upon facts.

Where, as here, the decision of the District Court is clearly erroneous the Appellate Court may grant relief.

"A finding is clearly erroneous when, although there is evidence to support it, the reviewing court,

on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

U.S. vs U.S. GYPSUM COMPANY, 333 U.S. 364, 395; 92 L. Ed. 746, 765;

U.S. vs Oregon Medical Society, 343 U.S. 329; 96 L. Ed. 978;

Kuhn vs Princess Lida of Thurn & Taxis, 119 Fed 2d, 704.

Applied to a consideration of medical testimony we call the Court's attention to the following:

McAllister vs U.S., 348 U.S. 19, 99 L. Ed. 20;

U.S. vs Fotopolus, 180 F 2d 631.

Applied to other situations:

Desch vs U.S., 186 F. 2d 623;

Gutowsky vs Jones, 178 F 2d 60;

Maragakis vs United States, 172 F 393.

EXPERT MEDICAL EVIDENCE

This case is one which, from its very nature, requires the assistance of medical and surgical experts to point the way to an intelligent decision.

We have the following known facts to start with:

The fall of Livingston upon the appellant. The details of which are here before this Court as they were before the District Court.

The fact that it is not disputed that the appellant's damage was caused by a vascular embolus which blocked the circulation in appellant's legs and which resulted in his crippled condition.

The fact that no evidence of disease, which could be responsible for the formation of a thrombus, could be found in appellant's body.

The fact that a month before the catastrophe struck, when appellant would have no reason to misrepresent, in a report to his physician, appellant reported that he had suffered pain in his upper abdomen of several months duration, which was worse on inspiration and on bending forward. This had become markedly aggravated the last few weeks before admission.

The fact that a month later a thrombus which slipped and went down his legs was established by the medical evidence. This thrombus was at the bifurcation of blood vessels in his abdomen.

These known facts were the foundation of the testimony that the fall of Livingston on appellant on June 2nd 1949 was directly responsible for appellants crippled condition which then developed on January 7th, 1950.

We urge that these facts and this medical evidence is abundantly sufficient to establish appellants case and the extent of his damages.

Hartford Accident and Indemnity Co. vs Industrial Commission of Utah, 64 Utah 176, 228 Pac. 753;

Schroeder vs Western Union Teleg Co., 129 SW 2d, 917. (Mo.);

Sullivan vs Boston Elev. R. Co., 185 Mass. 602, 71 N. E. 90;

In De Filippo's Case, 284 Mass. 531, 188 N. E. 245.

The possibility that there might be other causes will not weaken the testimony of an expert who with reason and clear deduction finds the real cause of the catastrophe.

Blanchard's Case, 277 Mass. 413, 178 N. E. 606;
Glen L. Wigton Motor Co. vs Phillips, 163 Okla. 160 21 P 2d 751.

THE NEW ENGLAND JOURNAL
OF MEDICINE EXHIBIT

These 10 histories in the Crane article show that thrombi can develop in the large veins of the legs following strains by falling off scaffolds, helping to lift heavy weights, etc. The veins affected in this list are mostly the iliac, vena cava, femoral, popliteal, femoro-ilac veins. The pressure on these veins was from the feet *up*. The pressure in Hennessey's from the shoulder and back *down*.

The thrombi in these cases have all developed after severe strain on the full veins of the lower extremities and vena cava. The strains were not long continued, as in the Dr. Pollock case of 16 seconds. They were short and brief strain, such as was present in the Hennessey case.

Edema, swelling of the legs, appear quite frequently in these cases. The pressure was from the feet up. The peripheral veins are numerous and smaller than the vena cava. There was *no swelling* in the Hennessey case at any time. The pressure was from above down. Vena cava is large at the bifurcation. The thrombus in the Hennessey case took 6½ months to show signs of its presence. It began with a feeling of fullness and heaviness in the upper abdomen and chest, cough and hoarseness. The second attack of this kind developed 28 days later with practically similar symptoms but a little more severe as broncho-pneumonia was one of the diagnosis made. In this interval of 28 days Hennessey never felt well. Chest and upper abdomen felt full and distressful.

The following case illustrates how a contusion of the chest may be followed by a thrombus in the inferior

vena cava and left iliac vein following an interval of two weeks. This case is taken from a book entitled "Trauma in Internal Disease" by Dr. Stern, page 177.

"A farmer, 63 years of age and previously in excellent health, fell from a cart and struck his chest on an iron chain. He at once became short of breath and complained of thoracic pain. A physician was called in and made a diagnosis of pulmonary emphysema. Two weeks later, the man ran a temperature and suffered severe dyspnoea. A diagnosis of lobar pneumonia was made. Two weeks later the patient died. Post-mortem: Thrombosis of the inferior vena cava and of left internal iliac vein, the pulmonary artery was obstructed by an embolus; the left 5th, 6th and right 7th ribs were fractured. The court acknowledged that death was caused by the fall and was, therefore, compensable."

Cases developing thrombosis on the venous side of the circulation are difficult to find in medical literature, as was told Judge Murray when he demanded recent examples of thrombosis after the Dr. Pollock case was introduced in the trial.

In Chapter 14, Page 176 in Dr. Stern's book of "Trauma in Internal Disease", published in 1945, the following remark was made: "Our subject is limited to the traumatic thrombosis of the *major veins*, which is extremely rare."

Dr. Crane found 10 cases from 1930 to 1952.

Dr. Stern states major vein thrombosis are rare.

A review of the few cases of venous thrombosis presented in this paper, the varied manner in which they formed from intravascular pressure, the time of the appearance

of symptoms from immediate to long drawn out years, the scarcity of cases of thrombosis in the medical literature on the venous side demonstrate that there is no regular set type by which venous thrombosis of deep veins can be recognized or the time the symptoms of thrombosis may appear.

Dr. David Starr Jordan, President of Stanford University, once remarked in a lecture that "no two leaves on a tree were just alike." This also applies to injuries of veins.

Thrombosis of veins are intimately associated with *collateral venous systems* which afford channels for the passage of blood when the main caval system is obstructed by thrombi.

As Judge Murray, in the Hennessey case, has used an example of a collateral channel that did not appear when a thrombus of a deep vessel existed to support one of his reasons for denying Mr. Hennessey's claim for injuries sustained at the airport in Pocatello, Idaho, June 2, 1949, we wish to explain the function of collateral systems.

THE COLLATERAL CIRCULATORY SYSTEMS

A sudden complete obstructive lesion of the *arterial or venous system* at the bifurcation of aorta or vena cava would cause vaso-spasm of the blood vessels below the obstruction.

In the Hennessey case, the obstruction was at the bifurcation of the vena cava because there was no vascular lesion in the arterial system to account for the presence of such an obstruction. Since that is the acknowledged fact it follows that the lesion was in the venous system located

at the bifurcation of the vena cava. Further, this location was determined by the history of this case. Both legs were involved.

The obstruction took place while the patient was in the Deaconess Hospital on the morning of Jan 7, 1950. Mr. Hennessey was getting ready to leave the hospital for home. He had just recovered from a second attack of broncho-pneumonia and laryngitis! (We think he had a pulmonary embolus, not broncho-pneumonia.)

He suddenly suffered a severe pain in his lower back, both legs turned bluish white and cold. Heavy sedation and anti-coagulant treatment was instituted immediately. Within $1\frac{1}{2}$ hours the color was restored to both legs, pain was lessened, no edema of the legs was observed and free passage of blood through the vena cava was therefore resumed.

The heart was beating during the $1\frac{1}{2}$ hours of the attack. The blood was circulating through both the venous and arterial systems. Some of the venous blood must have gone through the bifurcation of the vena cava where the obstruction was because there was no marked swelling of the legs or feet reported. Dr. Stokoe reported in his notes Jan. 8, 1950, that "the area of gangrene was apparently decreasing with the anti-coagulent therapy." (R. 147.) But other channels than the vena cava for the Blood to by-pass the obstruction at the bifurcation of the vena cava were available.

See Appendix following last page for illustrations.

The important collateral system or channel in this case is the vertebral column of veins that parallel the caval

system. In the 26th edition of Gary's Anatomy is a good description of this channel which is copied and presented here. (See Gray's Anatomy, 26th ed. p. 743,) and named *Channel I*.

CHANNEL No. I.

"According to Batson (194) the veins of the vertebral column constitute a system paralleling the caval system. He reached this conclusion as a result of X-ray studies of human cadavers and living animals. A thin solution of radiopaque material which he injected into the dorsal vein of the penis in a cadaver found its way readily into the veins of the entire vertebral column, the skull, and the interior of the cranium. The material drained from the dorsal vein of the penis into the prostatic plexus and then followed communications with the veins of the sacrum, ilium, lumbar vertebrae, upper femur, and the venae vasorum of the large femoral blood vessels, without traversing the main caval tributaries. Similarly, material injected into a small breast vein found its way into the veins of the clavicle, the intercostal veins, the head of the humerus, cervical vertebrae, and dural sinuses without following the caval paths. *Thorium dioxide injected into the dorsal vein of the penis of an anaethetized monkey drained into the caval system when the animal was undisturbed, but if its abdomen was put under pressure with a binder, simulating the increased intra-abdominal pressure of coughing or straining, the material drained into the veins of the vertebrae.* Batson believes that the spread of metastases from tumors and abscesses, in many cases such as the metastases to the pelvic bones from the prostate, can

be explained only through the channels of the vertebral venous system and its extensive communication with the caval system. When the pressure within the thorax and abdomen is increased by coughing or straining, the blood may flow along the vertebral system rather than the caval and it may even be forced into the vertebral veins from the viscera."

(This proves the cause of the paralysis and spasms in the legs as explained by Dr. Horst.)

Channel No. 2. Anastomosis between lumbar veins and ascending lumbar of the azygos system.

Channel No. 3. Anastomosis between the superior and inferior hemorrhoidal veins.

Channel No. 4. The thoraco-epigastric vein connects the superficial inferior epigastric with the lateral thoracic vein.

Channel No. 5. Anastomosis with the portal system.

Channel No. 6. Subperitoneal veins. The Dr. Pollock case.

The Court will take judicial notice of the structure of the body 31 C. J. S. Sec. 79, Page 662.

At 9:00 a.m. Jan. 7, 1950, the first attack of back pain and veno-spasm in Hennessey took place in the Deaconess Hospital in Billings, Mont. Within 1½ hours it was stopped by heavy sedation and anti-coagulants. Six and one half (6½) hours later the second attack took place. There was an acute pain behind the left knee, extending down to the great toe and heel. Legs became white and cold (veno-spasm.) Heavy sedation and anti-coagulants relieved the condition again. The patient was heavily sedated. The left leg was extremely painful. Left leg went into spasms

that lasted five to 10 minutes. Attacks of this kind called for "hypos." This condition lasted the entire time he was in the hospital and even now they come on, day or night.

It was when these spasmodic muscular contractions began that emboli from the thrombus in the vena cava and iliac veins were loosened up and conveyed by Channel No. 1 to the spinal canal. Emboli in the venous capillaries of the spinal cord caused minute thrombi to form. These thrombi caused involuntary contractions of muscles in the left and right legs.

Nerve stimuli which normally maintain the tone of the leg muscles together with irregular nerve stimuli arising from the thrombus in the space behind the left knee (popliteal space) poured abnormal nerve stimuli into the spinal cord.

The lower spinal cord in a hypersensitive condition probably disconnected to some degree from the pyramidal system of the brain which controls it, responded excessively to this stimulation. The irregular appearance of the spasms were the result of the disordered nervous mechanism caused by the emboli from the thrombi in the vena cava, the two iliac veins and the thrombus in the space behind the knee (popliteal space.)

The muscular painful spasms which kept up for two and one-half months in the hospital and approximately a year and one-half since leaving it, were involuntary. The lateral spino-thalamic tract which conveys sensations of pain is located ventro-lateral to the anterior horn of the gray matter of the spinal cord. The proximity of these units explain the cause of the pain that is associated with these involuntary spasms.

The pain, swelling and blueness of the left leg, inability to walk more than a block or two, from which Mr. Hennessey has suffered since leaving the hospital, and from which he continues to suffer, is due to the thrombosis of the veins in the space behind the left knee (popliteal space.)

CAUSE AND EFFECT

After a careful consideration of the foregoing facts and the law, we approach the question of the result of the defendant's negligence and we study the effect of Mr. Livingston's fall upon the plaintiff.

To appreciate the weight of the falling body, we try to lift a ninety-eight pound sack of flour and it was forcibly brought home to us when lifting this weight what it means to have a one hundred and thirty pound man drop through a twelve foot ceiling and strike a human being.

We earnestly contend and say to the court that the shock of this fall upon the plaintiff was tremendous and it is slightly less than a miracle that the plaintiff wasn't crushed by the force.

If Livingston was upright the center of gravity of his body would be approximately three feet above the plaster board that he stepped on as he fell and we call the court's attention to the fact that his weight fell through space approximately ten feet.

Livingston sustained a slightly brused knee falling on a concrete floor fifteen feet below his center of gravity and this surely is evidence enough that the plaintiff absorbed the shock of this fall with his body.

Therefore, we sincerely say that there is nothing in the evidence of trauma to the plaintiff that remotely compares

with this force crushing downward against his body.

We recall that one of plaintiff's physicians testified that the rolling over of an automobile created a force entirely different.

We are looking at the small figures to the left of the central figure shown in the bodyscope (plaintiff's exhibit 7) which show the arteries and veins in human figures and we visualize what the doctors call the vascular tree.

We contemplate the position of the descending aorta and the ascending vena cava as they are placed side by side at their respective bifurcation in front of the spine surrounded by the intestines and the abdominal organs.

We contemplate the effect of the shock of this force applied to these vessels filled with blood and we urge the reasonable probability, in the light of subsequent events, of damage to the walls of these blood vessels.

Such is the reasonable diagnosis of the only medical expert testifying in this case after a profound study of the entire history of plaintiff from birth with relation to cause and effect.

When the end result is the same what difference does it make whether the clot plugged the aorta or the vein, the exact determination of which must rest at some future date upon the results of an autopsy.

All physicians who have testified in this case agree that as to his crippled legs the plaintiff's physical condition has been brought about as the result of vascular damage caused by a blood clot and the consequent interruption of the circulation.

We have learned from the study of this case that the formation of a thrombus results from deposit of fibrin

platelets at the site of an infection or an injury to the blood vessel which is called an agglutinative process.

The sources of thrombus from disease have been ruled out by the physicians and the contemplation of the entire testimony will show that there is NO EVIDENCE OF DISEASE which would cause a thrombus to form. Therefore, in all reasonable probability the thrombus or thrombi, involved in this case, had to result from trauma to the blood vessels.

And the history of this case, as shown by the evidence, demonstrates that with reasonable probability the trauma to the blood vessel occurred when Livingston fell upon the plaintiff.

The attending physician was concerned with the symptoms and the treatment of the patient more than with the cause and inception of the condition he was suffering from.

The expert of many years experience, after thorough study and analyses of the case, has given us his opinion based upon the complete history, a complete search of the hospital records and a thorough study of the literature, that in all reasonable probability the plaintiff's condition is the result of the man falling upon the plaintiff on June 2nd, 1949.

Realizing that we have the burden of satisfying the court by a preponderance of the evidence of the truth of our position, we start with the premise:

"The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required,

or that degree of proof which produces conviction in an unprejudiced mind."

Sec. 93-301-4, R. C. M. 1947.

This section must be taken in connection with another section of our codes directing the jury to be instructed:

"That in civil cases the affirmative of the issue must be proved and when the evidence is contradictory the decision must be made according to the preponderance of the evidence; that in criminal cases guilt must be established beyond a reasonable doubt."

Sec. 93-2001-1, R. C. M. 1947, Subdivision 5.

We believe that the Judges of this court, while engaged in the practice have frequently encountered clients who have suffered a compressed fracture of the vertebrae of the back by falling a few feet in a bent over position.

We recall a case of a miner who fell a distance of ten feet landing on his feet and pitching forward who sustained a compression fracture of one of the lumbar vertebrae.

This force is certainly comparable to the force we have to deal with in the case we are considering.

If such a force could crush the compact bony body of a vertebrae, we certainly should conclude that a similar force could damage the walls of the blood vessels.

For all practical purposes the plaintiff was a normal, healthy young man and the circulation of the blood insures that his veins and arteries were filled with blood at the time that he received the shock of the man falling upon him.

Searching through five Decennial Digests, we were unable to find one exactly similar case as regards an accident similar to this one. Therefore, reasonable comparison should aid the court to prove to them that vein damage has occurred in comparable accidents. We do not believe that the court would insist on finding an exactly similar occurrence in medical history before the court would be convinced of the cause and effect in this case.

If we demonstrate by medical histories that comparatively slight effort or strain have caused the development of thrombus in a blood vessel, then the court should be satisfied that a strain has produced a condition in the lining of a blood vessel which resulted in the propagation of a thrombus.

And consequently the court can reasonably conclude that an opinion of a medical expert that the severe shock shown in the evidence in this case damaged a blood vessel and resulted in a thrombus which with reasonable probability has caused plaintiff's disability, is abundantly supported in medical experience.

Therefore, we find in our limited medical libraries the April 3rd, 1952, issue of "The New England Journal of Medicine" in which issue, commencing at page 529, we find an intelligent discussion by an eminent surgeon of case histories where such damage has occurred and on page 531 a table listing ten cases, comparatively recent, where the vein damage has occurred in the deep veins, some in the vena cava.

These should convince the court that the opinion of the expert is supported by a respectable number of medical histories.

On page 318 to 323 of the record, Dr. Horst relates the case history which is strikingly comparable to the case we are considering of the plaintiff.

In passing, as we contemplate all the medical testimony in our present analyses, we recall the testimony of one of the doctors to the effect that a thrombus would occlude a vessel regardless of size in a period of fifteen days.

We also recall "The tongue in cheek" attitude of counsel with respect to a blood clot slipping down from the bifurcation of the vena cava and producing the embolism with which we are concerned.

In our study of this case we have encountered two definitions gleaned from Stedman's Medical Dictionary:

"Fibrinous thrombus: One formed by repeated deposits of fibrin from the circulating blood; *it usually does not completely occlude the vessel.*" (emphasis supplied).

"Retrograde embolism: The plugging of a vein by a mass carried in a direction contrary to that of the normal blood current."

We are handicapped in Montana by the lack of a complete medical library. We are sure, however, that this was not the case with Thomas Lathrop Stedman, A.M., M.D. in his preparation of his medical dictionary which we believe has gone into the fourteenth edition.

He disagrees with Dr. Allard who testified as we have above referred to.

Likewise retrograde embolism appears common enough to be included in a recognized medical dictionary.

It manifestly appears from the evidence that Mr. Livingston fell upon Mr. Hennessey a direct blow. (R. 58-63.)

As he came through the ceiling he was hurtling through space. Upon coming in contact with Mr. Hennessey the shock of the blow was applied against the plaintiff's body as he fell directly upon his neck and shoulder and across his back; thus the entire force was crushed upon the plaintiff. After the shock was applied Livingston slid to the floor and his contact with the concrete floor left Livingston with a slightly bruised knee.

Mr. Hennessey bending over the wash basin, a normal, healthy individual with a normal heart for a young man of his age, with healthy blood vessels filled with blood, absorbed this tremendous shock.

The Inferior Vena Cava with a column of blood moving upward and beside the abdominal Aorta with a column of blood moving downward compressed together from the position of his body.

Subsequent events demonstrate that either or both of these main blood vessels were damaged by the surge of blood against the folds of the vessel and we have the source—the only source—appearing in the evidence, which produced the thrombi which developed into the large saddle clots at the bifurcation of the blood vessels.

“The outstanding connecting link in the history of this case between the injury and catastrophe appears in the evidence a month before the embolism struck.

On November 29th, 1949, in St. Vincent's Hospital, the plaintiff was suffering from acute laryngitis. His history was taken. Plaintiff complained of left anterior chest pains and *abdominal pains in the right upper quadrant of several months duration—worse on inspiration and on bending*

forward—markedly worse the past few weeks. No hemoptysis—no spitting of blood or bleeding from the lungs or bronchial tubes. (Defendant's exhibit 1 — personal history.)

Here we find the pain reaction to the gradually propagating thrombi which grew in the blood vessels following the injury and brought about the catastrophe.

Following the injury of June 2nd, 1949, the thrombus was forming in the blood vessels.

Inhalation draws blood into the lungs from the veins; bending over forward causes pressure on the deep abdominal blood vessels.

Thus the symptoms mentioned in the history given at St. Vincent's Hospital are accounted for. (Defendant's exhibit 1—personal history.)

A considerable discussion arose during the trial of this case, because, in seeking an illustrative medical history to demonstrate how pressure in a large vein could cause damage resulting in Thrombosis, one of the doctors testifying had brought a reference to an instance of a young college student, Dr. W. Rivers Pollock, who held his breath in a foot-race for one-fourth of a minute while in strenuous effort.

Comparisons between Joe Hennesey's case and that case history were discussed and, we submit in all earnestness, that the witness supported his position with cogent reasoning.

When we consider Pascal's law, to the effect that pressure applied to an enclosed fluid is transmitted equally in all directions and acts with equal force on equal surfaces,

the force applied against a venous wall will damage any point where the vessel would be pinched or confined such as the bifurcation of the vessel adjacent to muscular folds and a near bursting force is created that will damage vein or artery wall.

The court, indicating a desire to have the aid of some more medical histories, called attention to the fact, that in the then state of the record, there were but two instances shown of thrombus formed in the vena cava.

While the court's position was technically correct, we were chagrined because of the court's attitude toward this testimony. If the two cases are good cases they are entitled to favorable consideration. If the atom bomb, which was exploded at Hiroshima, was the first instance of such a phenomenon, it was none the less destructive.

We are sure that our witness, of great experience, has been an earnest, outstanding student, who has done intensive research and study while working at his profession.

The fact that our witness did not have, available in court, a number of similar case histories did not support the conclusion that, in medical experience, there were but two — Dr. Pollock's and Joe Hennessey's.

On the contrary between the first and second sessions of the trial, we have submitted case histories of more than twenty instances where veins were damaged by pressures, effort and strain which we have referred to heretofore in this memorandum.

As the witness explained the reason for the case history of Dr. Pollock was to illustrate what pressure would do to a blood vessel, even though the pressure on the blood

vessels in Dr. Pollock's case was caused by the force of the heart pumping against the holding of his breath while the pressure on the blood vessels in the Hennessey case was caused by the force of Livingston's fall on the plaintiff. In each case the blood vessel was damaged resulting in thrombosis.

A force from the north is no different than equal force from the south.

The case histories listed at page 529 et seq of the New England Journal of Medicine, while not cases on all fours with the Hennessey case, nevertheless demonstrate how thrombi have been caused in blood vessels under comparable circumstances. For instance if a man falls seven or four feet and lands on his feet and suffers a deep venous thrombosis of the iliac veins and the vena cava the reverse instance, of a man falling seven feet upon the body of another man will also cause thrombosis of the vena cava and the iliac veins.

A force pushing upward from a fall on the feet is certainly no greater, if as great, as a force pushing downward from the shoulder and neck.

In the legal profession, where we deal with legal principles and have the benefit of hundreds of thousands of recorded cases in our Reporter and Case Systems, we sincerely doubt if there are ever two cases found exactly alike in every particular. Nevertheless, thousands of cases are decided by comparative reasoning. Yet the District Court insisted on an exactly similar case before being convinced.

Therefore, in presenting our case we believe that the accepted practice is for a medical expert to testify and

give his opinion based upon the history and study of the case, as to cause and effect for the purpose of aiding the court to deal with a branch of science with which courts and juries are usually not familiar, relying on the learning and experience of the expert to present us with the end result we are seeking.

Thus they bring with their considered opinion, all learning, experience and the case histories of their profession as studied, compared and applied to the case at issue.

The case of Dr. Pollock appears to be a more severe injury than the case of Joe Hennessey. We doubt if Joe Hennessey's blood vessels are completely occluded to this day. From the symptoms, with reasonable certainty, collateral circulation canalization or by-passing has taken place in Joe Hennessey's veins and arteries.

With Dr. Pollock his vena cava completely occluded, which was proven by an autopsy after his death. Medical Science had the benefit of Dr. Pollock's case history from its inception throughout the remainder of his life and through post mortem after his death. His case has been outstanding and referred to a number of times in the texts to prove the point.

We sincerely urge to the court that the illustration was apt, compelling and pertinent and reasonable correlation among the case histories now before the court and a consideration of the evidence in this case should convince the court that our position is strong and sustained with reasonable certainty.

From the very nature of this case, that is an injury to the lining of a blood vessel, it is very difficult for medical

science to point exactly to an injury or condition and say "here within this blood vessel it is."

However, doctors have learned to reason from symptoms to arrive at their conclusions.

As we have heretofore mentioned whether this thrombus was in the veins or the arteries or whether there were thrombi in both, is immaterial to the determination of this case because as far as the damage to the legs are concerned the end result would be the same. (R. 316-359, et seq.)

With full contemplation of this case we suggest to the court that the evidence shows beyond question that the plaintiff suffered with severe vascular damage originating with a thrombus in a blood vessel or the blood vessels. The attending physician has ruled out infection, damage to the heart or damage to the lungs as possible sources of emboli; that the clot was too large to have come from smaller blood vessels in the body and that there was no deformed condition in the plaintiff's heart that would permit a large clot to come through the heart and by-pass the lungs.

The evidence is that the plaintiff's blood vessels were in excellent condition.

No doctor testifying in this case considered the history of nephritis as a source of emboli. One doctor suggested that the hospital records of the nephritis case at St. James Hospital indicated that the principal function of the kidneys were active and working and a study of the record will show that very slight residuals remained in recent years.

A fair resume of the evidence discloses that disease and infection has been eliminated. The automobile accident has been eliminated for all practical purposes.

The evidence therefore leaves the injury of June 2nd, 1949, as the proximate cause of the plaintiff's bodily injuries.

This conclusion is further sustained by reasonable analysis of all of the evidence, medical and otherwise.

It then becomes the duty of the court to find for the appellant and against the appellee in this case.

The testimony of the doctor who made a most thorough study of all the medical history of the plaintiff and all the hospital and medical records, together with an exhaustive and complete physical examination on his own account, has definitely stated that in his opinion the fall of Livingston upon the appellant is entirely responsible for the injuries which appellant received.

We submit some illustrative cases:

In a well reasoned opinion Circuit Judge Phillips discussed a case where an eleven year old boy had a pipe which extended from the defendant's oil well fall across his shoulders, and subsequently suffered a tuberculosis of the bone, used the following language:

"The medical expert stated that tuberculosis of the bone usually is caused by trauma which lowers the vitality and resistance of the tissues and makes them susceptible to a tubercular infection already present in the system. He stated that strong pressure on a joint or forcing it out of normal position may create a condition making it susceptible to tubercular infection. He stated that tuberculosis of the bone usually develops slowly and that the condition he found in Colvard had probably been progressing for two or three years.

In answer to a hypothetical question which embraced the facts above detailed respecting the accident, the

ensuing history, and the facts he found upon his examination, the medical expert stated as his opinion that the tubercular condition in the spine and left hip joint was caused by the injury Colvard received on April 20, 1932. He stated that the impact and weight of the pipe exerted an indirect force upon the dorsal spine and the hip joint resulting in injury thereto and making them susceptible to the tubercular infection present in the system of Colvard; that tuberculosis of the bone usually develops first in the spine and then in the hip joints, and that Colvard's injuries were permanent.

There facts were clearly sufficient to take the case to the jury and we conclude that the court did not err in denying the motion of the Champlin Company for a directed verdict."

Champlin Refining Co. vs. Thomas, 93, Fed. (2nd) 133.

The foregoing case illustrates that the opinion of the medical expert witness relating to cause and effect of trauma and the resulting physical condition of a plaintiff is held to be sufficient evidence to establish the facts testified to by the expert.

See also:

Oklahoma Natural Gas Co. vs Kelly, 153 Pac. (2nd) 1010.

A salesman was bitten by a wood tick and died and the Supreme Court of Idaho used the following language in considering whether or not he was entitled to Workmen's Compensation:

"This court held in the well considered case of Newman v. Great Shoshone & Twin Falls Water

Power Company, 28 Idaho, 156 P. 111, that 'in a civil case it is not necessary that the facts which the verdict is based be established beyond a reasonable doubt. It is the duty of the jury to decide according to the preponderance of the evidence and the reasonable probability of truth.' And in the case of Adams vs. Bunker Hill, etc., Mining Company (on rehearing), 12 Idaho 637, 89 p. 624, 628, 11 L. R. A. (N. S.) 844, this court said: 'There are very few things in human affairs and especially in litigation involving damages, that can be established to such an absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause'."

Roe vs. Boise Grocery Co., 21 Pac. (2nd) 910 at page 913.

The following case from the Supreme Court of Wisconsin, gives us aid in dealing with the subject under consideration:

"The cause and origin of disease is often obscure and elusive. It is not subject to exact and definite proof comparable to physical facts. Unless a determination of such questions can rest on a preponderance of probabilities, justice must often be defeated. With reference to a germ disease this court has said: 'It is often impossible to find the source from which a germ causing disease has come. The germ leaves no trail that can be followed. Proof often does not pass beyond the stage of possibilities, because no one can testify positively to the source from which the germ

came, as can be done in the case of physical facts which may be observed, and concerning which witnesses can acquire positive knowledge. Under such circumstances the Industrial Commission or the court can base its findings upon a preponderance of probabilities or of the inferences that may be drawn from established facts.' (citing cases.) This rule is applicable here. The evidence eliminates everything except the injury of 1920 as a cause of the cataract. While the result is unusual, it is not impossible. We have, therefore, a cataract due to some injury. The only injury to which it may be attributed is that of 1920. Under the circumstances, a finding that it was so caused is supported by at least a preponderance of probabilities."

Acme Body Works et al vs. Koepsel, 234 N. W. 756 at 757.

We appreciate that the medical witnesses in this case do not find themselves in absolute agreement on all the details of the case; that the plaintiff's condition is due to vascular damage is agreed by all.

Small concern then should be indulged in by the court because the court can certainly conclude that Joe Hennessey is in his present physical condition as the result of damage to his blood vessels brought about by Livingston's fall upon him on June 2nd, 1949.

The Montana Supreme Court in a case where doctors disagreed as to cause and effect of a physical condition said as follows:

"The record contains no direct evidence from which it can be said that the injury was the proximate condition; this, not because of failure on the part of claimant properly to present his case, but because, on the frank admission of the doctors, no man on earth

knows positively the exact cause of such an affliction in any given case; medical science has not advanced to a point where it can positively trace back from the effect and declare the cause of the disease in a given patient. But this fact alone need not bar the claimant from recovery, if, on the record, it can be said that he is entitled thereto.

The law does not require the impossible; it does not require demonstration or such a degree of proof as, excluding the possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in the unprejudiced mind. (Sec. 10491, Rev. Codes 1921.) A fact may be established by indirect evidence, or that which tends to establish the fact by proving another which, though true, does not of itself conclusively establish that fact, but which afford as inference or presumption of its existence. (Sec. 10497, Id.) Evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in the unprejudiced mind. (Sec. 10500, Id.)

Further, the solution of any issue in a civil case may rest entirely upon circumstantial evidence; the law makes no distinction as to the probative value of this class of evidence and direct evidence, and, if the circumstantial evidence in this case furnishes support for the claimant's theory, and thus tends to exclude any other theory, it is sufficient. (citing cases.) In this class of cases the rule is that the burden of proving that the injury was the proximate cause of the condition of the claimant may be proved by circumstantial evidence or inferences having a substantial basis in the evidence. (1 Honnold on Workmen's Compensation, 266, citing cases from Michigan, Illinois, West Virginia and Massachusetts.)

Moffett vs. Bozeman Canning Co., et al, 95 Mont. 347 at page 358, 26 P. (2nd) 973.

See Also:

Hines vs. Industrial Acc. Comm. 8 Pac. 2nd 1021;

Kirby vs. Elk Grove High School Dist., 36 Pac 2nd 431;

Hendrix vs. City of Twin Falls, 29 Pac. 2nd 352;

Riley vs. City of Boise, 31 Pac. 2nd 968.

In the presentation of our case in regard to the testimony of the physicians, we have called as witnesses all doctors who were in any manner connected with the case.

In considering the testimony of the physicians who have testified in the case, if the court finds one more favorable than the other to the plaintiff's case, the plaintiff is entitled to the most favorable testimony, even though there is no material conflict so far as the end result in this case is concerned.

The rule is well stated in a recent case before the Montana Supreme Court. We quote:

"This is but an extension of the well settled rule that a party is entitled to have the evidence viewed in the light most favorable to him where there is a conflict in the evidence arising from discrepancies between the testimony of his own witnesses. Hardie vs. Peterson, 86 Mont. 150, 282 Pac. 494; Federal Land Bank vs. Green, 108 Mont. 56, 90 Pac. (2nd) 489; Gohn vs. Butte Hotel Co., 88 Mont. 599, 295 Pac. 262; In re Cumming's Estate, 92 Mont. 185, 11 Pac. (2nd) 968; Stranahan vs. Independent Natural Gas Co., 98 Mont. 597, 41 Pac. (2nd) 39."

Lake vs. Webber, 120 Mont. 534 at page 545, 188 Pac. (2nd) 416.

With regard to the damages which arose from the injuries to the vascular system and the resulting physical impairment, the evidence shows that the plaintiff lost 80 per cent of his working time from the year 1950. Dur-

ing that year he received an income from work which he had done in previous years and he lost \$4000.00 in earnings for the year 1950; \$3000.00 lost in the year 1951 and \$1,500.00 lost in the year 1952, all as the proximate result of his injuries, making a total loss of earnings up to the date of the trial in the sum of \$8500.00.

The special damages incurred are Deaconess Hospital \$995.50 from January 7th to March 12th, 1950, inclusive; the Soltero Clinic \$12.00 expended for treatment of the shoulder and \$236.50 from January 7th to May 10th, 1950; \$136.00 for Physiotherapy; \$240.00 convalescence Northern Hotel, March 12th to May 11th, 1950; which makes a total for special damages of \$1620.00.

We have pleaded in our complaint that the plaintiff will be required to incur expense for hospitalization and for the services of physicians and surgeons a total sum of \$3500.00.

The sum of \$1880.00, modestly estimated, to be allowed for future hospital and medical services is to be anticipated with reasonable certainty considering the condition of the plaintiff.

Therefore, the \$1620.00 paid and incurred and the \$1880.00 anticipated sustains our pleading of \$3500.00.

A very modest figure to allow the plaintiff for depreciation in his earning ability, as the proximate result of his injuries sustained because of defendant's negligence, is one thousand dollars per year.

Taking the annuity table on page 902 of Schweitzer's trial guide, we find the present worth of this loss to be \$16,000.00.

Considering his physical injuries, pain and suffering, loss of ability to follow important duties of his profession and certain permanent future mental and physical suffering, the sum of \$18,000.00 certainly is a reasonable sum to be allowed to plaintiff as general damages.

The prayer of our complaint is a modest sum when we contemplate the foregoing discussion of the damages sustained.

DISCUSSION

We have used medical authorities in this brief just the same as we would use law authorities from law text books because we have a medical problem.

Dr. Horst made a complete physical examination of appellant. We believe that the conclusions of Dr. Horst, who has had the benefit of a complete review of the life history of appellant and, further, the benefit of the actual medical and hospital records of the patient, particularly the study of the Deaconess Hospital matters,, which conclusions have been swept aside by the decision of the District Court, are fortified by this medical literature.

Lawyers and judges are not expected to be able to make an intelligent analysis of a medical problem or be competent to independently evaluate a complex medical case. We depend on the assistance of men who have devoted a lifetime of study in the profession and call upon the medical expert to aid us in coming to a correct conclusion.

We urge to this Court that reasonable, credible evidence of a witness of the caliber and learning of this man, who

has devoted his life to his profession, and which stands unimpeached, except by experts who say "I don't know" and give us no explanation or support from any medical literature whatsoever, should be adopted by a trial court in its findings. Therefore, we appeal to this Court for relief.

Aside from the opinion of the expert, we have known facts which forcefully and reasonably support his deductions and conclusions.

With this evidence the Court will see that we are correct when we urge that the District Court's decision was clearly erroneous.

Sundquist vs. Madison R. Co., 197 Wis. 83, 221 N. W. 392;

Spirakoff et al vs. Pluto Coal Mining Co. et al (Colo.) 100 p. 2nd 154;

Reed vs. Rosenthal, 129 Oregon 203, 276 Pac. 684;

Shepard vs. Carnation Milk Co., 220 Iowa 466, 262 N. W. 110;

Pfeiffer vs. North Dakota Bureau, 57 N. D. 326, 221 N. W. 894;

Drew vs. Industrial Commission, 137 Ohio St. 499 26 N. E. 2nd 793;

Esmonde vs. Lima Loc. Wks., 51 Ohio App. 454, 1 N. E. 2nd 633.

In regard to the bland thrombosis that Judge Murray fails to understand, we offer this explanation:

The thrombosis in the vena cava and the right and left iliac veins began forming immediately after the intima of these vessels was split and contused by the compression force from the body of Mr. Livingston who fell upon him in the Airport at Pocatello.

No one knew that a thrombosis was forming in these vessels.

Patients rarely enter a hospital for hoarseness, cough and acute laryngitis. Dr. Stokoe hospitalized him because Mr. Hennessey gave a history of a fullness and heaviness in his chest from which he had been suffering for a few weeks and the pain in his abdomen which he had for several months.

X-ray picture of the chest was taken at St. Vincent's Hospital. The x-ray picture showed "minimal changes" to which no significance was attached. This was in reality a pulmonary embolus from the "*bland thrombosis*" in the vena cava and iliac vessels, the presence of which no one knew at the time.

Patient was discharged within a few days still complaining of his chest. Twenty-eight days later, Dr. Stokoe sent him to the hospital again for laryngitis, hoarseness and cough. Dr. Stokoe diagnosed the case as Broncho-pneumonia. After four days, Dr. Stokoe told him he could go home.

At this time, no one knew of the thrombi that had by now fully developed in the vena cava and iliac vessels. Then just as the patient was about to leave the thrombi slipped, united, formed an obstruction at the bifurcation of the vena cava and caused vaso-spasm of the vessels of the leg. *Then* the diagnosis of saddle-like thrombus of the bifurcation of the aorta was made.

This was a *bland thrombosis* that formed which Judge Murray described on Page 5 of his decision.

As a part of the district court's order, it appears that the time element mentioned, from two to seven days in the article entirely relates to the matter being discussed i.e. "Deep Venous Thrombosis *in the leg* following effort or strain.

In this case we have a situation developing in the great major blood vessels in the abdomen so that actually there is no comparison between the time element in this case and the cases mentioned about *the leg*. In those cases we have the compact formation of the tissues of the leg with the blood vessels therein and thrombosis reacts and shows itself in these smaller vessels quickly.

Why overlook the case history shown in the record (R. 319) where it absolutely demonstrates an 87-day period?

No two leaves on a tree are exactly alike.

In this case it took from June 2nd 1949 to January 7th 1950 for the thrombus to develop and the catastrophe strike.

Why didn't we have a massive pulmonary embolism? Because the thrombus did not loosen until it had reached a size sufficient to go against the flow of the blood because of its extent and weight. Also we have a healthy vigorous young man, whose body on the arterial side had no seed beds for a thrombus.

Trauma, and trauma alone, in the episode of Livingston falling upon him, damaging the deep veins, as explained, brought him the crippling condition from which he suffers.

The Crane article has this to say:

"Pulmonary embolism is rare and in younger patients is virtually unknown. . .

New England Journal of Medicine page 532.

The other doctors, clinging to the arterial side theory found themselves hanging in mid-air with no bodily condition found to support a theory of arterial embolus.

Dr. Horst placed it where it was and abundantly demonstrated why it was there.

A momentary force—true and a bullet likewise hits momentarily and what resulting damage it can do.

We are appending in the appendix to this brief some illustration of the vena cava and the azygos veins, a side view of the area and in addition to the bodyscope Exhibit 7 these illustrations show the collateral venous return which obtains when the common iliac or vena cava would be ligated.

This will illustrate that it is not necessary for superficial veins on the abdomen to be distended unless there is a complete blocking of all of this system as happened in Dr. Pollock's case. Joe Hennessey's case was relieved in a short time and circulation partially re-established so that he had no gangrene of any appreciable extent.

We believe that the learned trial judge demanded a degree of proof in this case which was impossible to supply.

"The law does not require the impossible; it does not require demonstration or such a degree of proof as, excluding the possibility of error, produces absolute certainty because such proof is rarely possible."
 "Evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in the unprejudiced mind."

Moffett vs. Bozeman Canning Co., 95 Mont. 347,
 26 P. 2nd 973.

We appreciate that it is an extremely unusual case and that it is one which requires deep study and the benefit of unbiased conclusions from the facts which are admitted.

Justice Oliver Wendell Holmes, in one of his memorable observations, once said "that judges sometimes ap-

proach the study of a case for decision with an inarticulate major premise."

We sincerely feel that, going through the trial of this case, his honor was likewise possessed of an inarticulate major premise which reacted unfavorably to appellant.

Dr. Hans Selye in his book "The Physiology and Pathology of Exposure to Stress" deals with many of the problems showing inter alia that any injury to the human body is met by adaptive responses. In the process of the adaptation syndrome, a substance known as hyalin is discharged into the blood stream. As it passes through the blood stream under the effect of reduced blood pressure, which is so frequently a concomitant of shock, it causes irritation in the tissues in which it is deposited and thrombosis ensues by it takes time and the eventual process of thrombosis is a slow and insidious one.

It was a slow insidious process in the Hennessey case.

CONCLUSION

Dr. Horst carefully, thoroughly and intelligently examined the appellant and he made an exhaustive study of all the facts and the medical and hospital histories of the appellant and his physical condition since boyhood and even studied his family history and considered appellant from childhood to the present time.

He was and we are convinced beyond doubt that the unfortunate crippled condition of the appellant came about by reason of the unusual accident which took place at the Pocatello Airport on June 2nd, 1949.

Throughout his testimony Dr. Horst has again and again stated that the fall of Livingston upon Mr. Hennessey was entirely responsible for the vascular catastrophe which developed and produced the crippling condition of the appellant.

This Court should be convinced of the extremely reasonable logical and honest considerations supporting Dr. Horst's conclusions in this case. Dr. Horst is right, absolutely right.

We have brought to this court of justice a complete history of the appellant from the time of his birth.

There never has been a case tried in a court of justice where a more complete presentation of facts have been offered.

The entire medical profession of the City of Billings, became interested. X-rays were taken. The case studied. All laboratory tests known to medical science were made of plaintiff's body, head, heart, lungs and vital organs and particularly the blood vessels.

All were found to be in excellent condition as far as any disease process was concerned.

This young man had no diseased blood vessels. No diseased organs. No diseased tissues.

Disease has been absolutely ruled out as a cause of his condition. The size of the blood clot was such that it could not have come from any small blood vessels.

The only serious illness which the plaintiff ever had is not infectuous. It does not and did not produce blood clots, particularly in view of the fact that the residuals of the disease have disappeared for several years.

The automobile accident was too remote. He had completely recovered from it. It was not the type of an accident that could produce vascular damage.

The occurrence of June 2nd, 1949, on the contrary was the compression type of injury. It was the type which would have and did damage the deep blood vessels at the bifurcations and folds by transmitting the shock to the inner linings according to Pascal's law.

Pain of unrecognized source was present in the plaintiff's abdomen, caused by the damaged blood vessels from the date of the injury until the date of the calamity in Deaconess Hospital.

Your Honors, we say in all sincerity, "There is but one cause, as has been repeatedly said and explained by Dr. Horst, which is responsible for the wrecked physical condition of the plaintiff and that is the fall of Livingston upon him on June 2nd 1949."

Trauma and trauma alone to the large blood vessels produced this extensive, propagated thrombus which slipped off and caused the damage.

We have shown how Livingston's negligence resulted in his fall upon plaintiff.

That it occurred in the scope of his employment which establishes the responsibility of the defendant.

We have outlined the damages from the extremely reasonable charge of Dr. Stokoe, through the extremely reasonable items of past and future damage.

The District Court's decision, being clearly erroneous, this Court is appealed to for the relief which appellant is entitled to in this case.

Respectfully submitted

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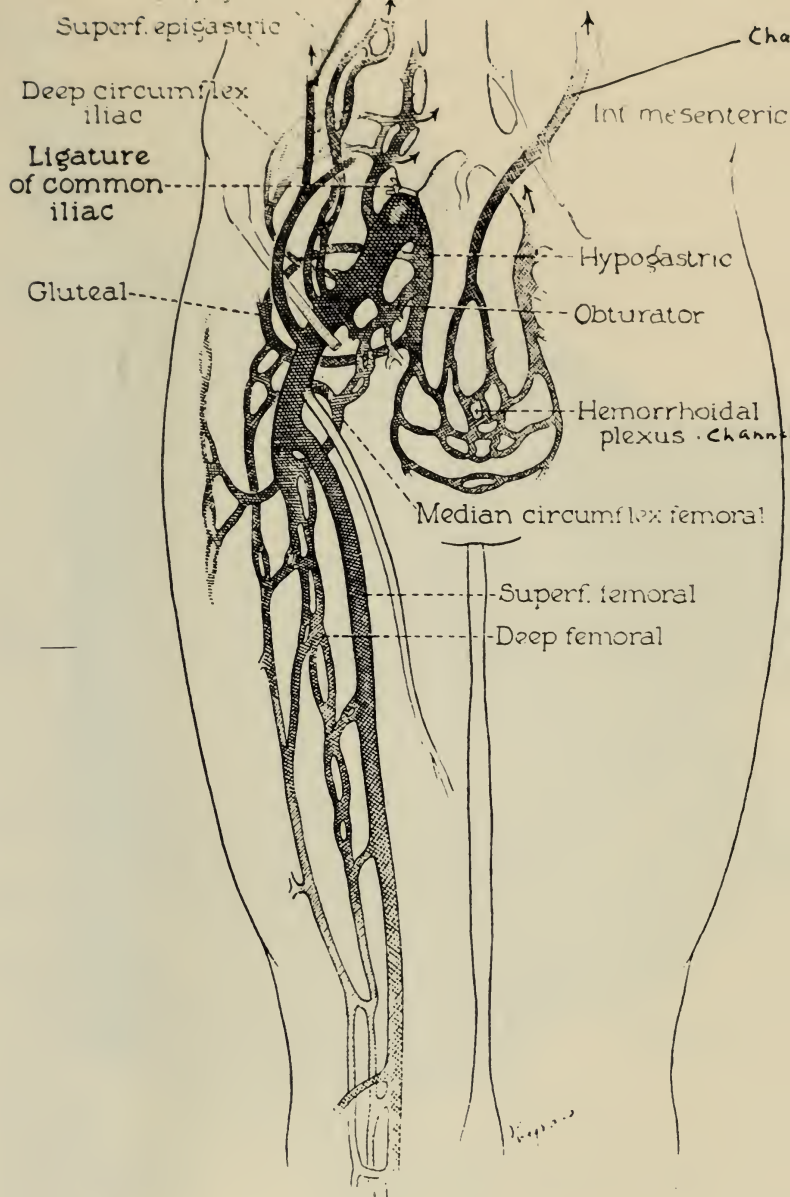


Fig. 4. A diagrammatic sketch as in Figure 3, showing the very much more abundant collateral venous return when the common iliac vein is interrupted.

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Montana

NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,
Butte, Montana;

DALE F. GALLES,
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No. 15063

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No. 15063

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Appellee.

BRIEF OF APPELLEE

STATEMENT OF ISSUES

This is an action arising under the Federal Tort Claims Act, wherein the Court sat as a trier of the facts, in which the United States of America is defendant-appellee. After hearing the evidence in the case, proposed Findings of Fact and Conclusions of Law were submitted by each party, and the Court thereafter made and filed its Findings of Fact and Conclusions of Law, in which it was found that certain injuries to the plaintiff's shoulder were the proximate result of the accident alleged, and that a blood clot arising months after the alleged accident was not sufficiently established by the evidence, and particularly medical testimony, for the Court to find it to be caused by an injury sustained in the accident

alleged. Conclusions of Law in accordance therewith were made and plaintiff thereafter filed a motion to amend the Findings of Fact and Conclusions of Law which was briefed, orally argued, and overruled. Judgment was thereupon entered. The plaintiff has appealed from this judgment, specifying as error, certain Findings of the Court and failure of this Court to make Findings relating the causation of the blood clot to the accident alleged.

Rule 52 (a), Federal Rules of Civil Procedure, provides in relevant parts:

“In all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Requests for Findings are not necessary for purposes of review. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. . . .”

The issue, therefore, is were the Court's Findings of Fact clearly erroneous with due regard being given to its opportunity to judge of the credibility of witnesses?

CONSTRUCTION OF RULE 52 (a)

Rule 52 (a) has been construed by this Circuit in numerous cases and is well defined in *Gamewell Company v. City of Phoenix*, 9th Circuit, 216 F. 2d, 928, wherein it is stated:

“The Findings stand before us with the presumption of validity unless they are clearly erroneous. (Rule 52 (a), Federal Rules of Civil Procedure.)

The object of the clause as to the effect of findings

is to give to findings the effect which they formerly had in equity. *United States v. Gypsum Co.*, 1948, 333 U. S. 364, 395. The aim is to

‘. . . make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only “clearly erroneous” findings.’ *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 1949, 336 U. S. 271, 275.

This advantage has been well stated by the Court of Appeals for the Second Circuit:

‘For the demeanor of an orally-testifying witness is “always assumed to be in evidence”. . . . The liar’s story may seem uncontradicted to one who merely reads it, yet it may be “contradicted” in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which “cold print does not preserve” and which constitute “lost evidence” so far as an upper court is concerned.’ *Broadcast Music, Inc., v. Havana Madrid Restaurant Corp.*, 2 Cir., 1949, 175 F. 2d, 77, 80.

Conversely, the Supreme Court has held that a finding is clearly erroneous when

‘. . . although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.’ *United States v. Gypsum Co.*, *supra*, p. 395.

To the same effect is *United States v. Oregon Medical Society*, 1952, 343, U. S. 326, 339.”

and also *Lev Wah Fook v. Brownell*, 9th Cir., 218 F. 2d, 924:

“So far as we have seen, this is the plainest of cases in which we are asked to retry the facts. Appellant asks up to apply the doctrine of the case of *United*

States v. United Gypsum Co., 333 U. S. 364-395, wherein it is held, 'Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings of administrative agencies or by a jury, this court (Supreme Court and this court, too, of course) may reverse findings of fact by a trial court where "clearly erroneous" A finding if clearly erroneous where although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' This simple statement does not convert the appellate tribunals into fact finding de novo trial courts. The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum are all ingredients of the compound which we may adjudge as valid or 'clearly erroneous'. By this test in the instant case, the judgment is not clearly erroneous. However, even if we should approach the problem as the original triers of fact upon the bare record, our conclusion would be the same. We briefly digest sufficient of the evidence to support our conclusions."

and with reference to conflicting evidence the Court states, in *Carr v. Yokohama Specie Bank, Limited*, 9th Cir., 200 F. 2d, 251:

"... where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that Court to choose between two permissible and conflicting views as to the weight of the evidence. *Bjornson v. Alaska S. S. Co.*, 9 Cir., 193 F. 2d 433. We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the finds of fact are not clearly erroneous."

ARGUMENT

A reading of the transcript reveals that the plaintiff, Joseph P. Hennessey, was born January 17, 1917. He had mumps and measles during his childhood (Tr. 30). In 1933, he had pneumonia and was in St. James Hospital, Butte, Montana, for two months, following which he developed acute nephritis (Tr. 30). The records of the St. James Hospital (Tr. 68) show that from July 28 to August 5, 1933, the plaintiff suffered from diarrhea, vomiting and abdominal aches. On April 20, 1934, plaintiff suffered from pneumonia and gastritis and was released on June 19, 1934 (Tr. 68). On June 25, 1934, he was afflicted with acute nephritis, which continued to October 20, 1934, which caused abdominal swelling and permanent scarring of the exterior of the abdomen (Tr. 68, 69). In 1941 he had a recurrence of the nephritis (Tr. 73, 74). In 1947 he overturned an automobile between Toston and Three Forks, Montana, resulting in a sore right shoulder, the soreness continuing for about six months (Tr. 34). In 1948, plaintiff was involved in an accident while a passenger on a Northwest Airlines Plane which overshot the runway in Butte, Montana, from which resulted sore abdominal muscles (Tr. 35, 36).

On June 2, 1949, the accident which was the subject of this action occurred, when the United States employee fell on the right shoulder and back of the plaintiff. In the fall of 1949, plaintiff was confined to St. Vincent's Hospital at Billings, Montana, for three or four days with acute laryngitis (Tr. 33, 34, 41). On January 3, 1950, he was confined to the St. Vincent's Hospital with

broncho-pneumonia. He was to be released on January 7, 1950, at which time he developed the symptoms which he contends were caused by the formation of a thrombus in the vena cava, as a result of the injuries sustained on June 2, 1949, some seven months earlier. That the thrombus formed an embolus which passed through the vein against the flow of blood in the vein into the leg at the time he arose from his hospital bed.

The plaintiff's height is six feet one-quarter inch; normal weight is from 175 to 185 pounds.

This medical history indicates that in addition to the normal childhood diseases plaintiff has twice had pneumonia, has had acute nephritis with a continuing history, has twice suffered from acute laryngitis, had an automobile accident in which he sustained the same injuries that occurred on June 2, 1949, and was in an intervening accident in the year 1948 while a passenger on the airlines. These facts would lead to the conclusion that the plaintiff has had more than a normal amount of sickness and injuries from accident during the course of his lifetime.

The accident which occurred on June 2, 1949, at about 2:00 o'clock P. M. at Pocatello, Idaho, involved the same type of injuries that occurred in the automobile accident in which the plaintiff was involved in 1947, and he received the same treatment after both accidents (Tr. 35, 76, 77).

The important question in the lower Court was: Has the plaintiff sustained the burden of proof in establishing the proximate cause of the condition which began on January 7, 1950, and resulted in permanent disability to some extent?

There was no dispute between the parties as to the law. As cited in plaintiff's brief, §93-301-4 R. C. M., 1947, fixes the degree of proof necessary. It states in part:

"Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind."

There was expert testimony in this case by Dr. Harry R. Soltero, one of the plaintiff's doctors; Dr. Robert Scott Stokoe, one of plaintiff's doctors; Dr. C. H. Horst, one of plaintiff's doctors; and Dr. Louis Clayton Allard, a doctor for the defendant.

Dr. Harry R. Soltero, who was the doctor first consulted by the plaintiff following the accident on June 2, 1949, and who was also the doctor treating the plaintiff for his injuries sustained in the automobile accident in 1947, gave no testimony with reference to any injuries other than the injuries to the shoulder and back of the plaintiff, and in this he testified that the reasonable value of the services which he rendered in that connection in the summer of 1949 was \$12.00 (Tr. 107). This is not controverted. Dr. Soltero testified that he diagnosed the same condition in the 1947 and 1949 accidents (Tr. 96, 97, 98) which was a supra claviclar neuritis on the right side, and he treated the plaintiff for this condition and that he responded normally to the treatment.

The second doctor testifying was Dr. Robert Scott Stokoe, who was the physician attending the plaintiff in early January of 1950. Dr. Stokoe testified (Tr. 155) that a thrombus will form in a few days. He went on to

identify the vena cava and aorta, and when asked (Tr. 163, 164):

“Q. All right, we will ask it that way. What was the source of the embolus, in your opinion?

A. I can't state where the embolus arose; it is impossible to state where it arose by anything short of an autopsy; I couldn't say where it arose. When we do eliminate the heart and we do eliminate the lungs, we can simply give an opinion that it may have arisen from the wall of the aorta as the only other remaining source, providing we also rule out a patent foramen ovale, which we previously discussed, through which an embolus could conceivably get from the venous side of the body to the arterial side. It is extremely doubtful, and it is extremely rare that an embolus gets from the venous side to the arterial side through this opening; so, if we rule out that as well, we know that it had to come from the arterial side, from the lung, the heart, or the aorta as the only remaining sources. To the best of our ability we have ruled out the heart. I still cannot say that this came from the aorta.

from which it seems that it was Dr. Stokoe's conclusion that he did not know where the embolus arose; but it reasonably could have come from the aorta (Tr. 167, 168). Dr. Stokoe testified as follows:

“A. I can't say where it arose. I can give a possibility with the aorta, or the lining of the aorta, probably, there being, as stated, an increase in pressure as you have asked being present momentarily, it is conceivable that a tear, either minimal or large, could happen in the wall of the aorta. Did it happen? I don't know; it is possible that it did happen.

Q. Is there, to your knowledge, any way, or any method that a physician can definitely state the source of a thrombus or where a thrombus forms inside of a blood vessel?

A. Under the conditions in this specific case, no.”

Dr. Stokoe, in effect, testified that he did not know where the embolus arose and that it is impossible in this case to tell where it did arise. He speculated on possibilities.

Even Dr. Horst, after testifying with reference to a case in 1880 in which a runner held his breath as a precedent, testified as follows (Tr. 309, 310, 311):

“Q. Your reason for so testifying and referring to that story is to show it is within the realm of possibility?

A. Yes, sir.

Q. That a thrombus could have developed in Mr. Hennessey's case?

A. That's right.

Q. The purpose is to show us that this could happen, it is within the realm of possibility?

A. Yes.

Q. It isn't a normal thing, it isn't the usual thing?

A. That's right.

Q. Doctor, did you consider in your diagnosis and your analysis of this case the fact that Dr. Soltero treated Mr. Hennessey for a right shoulder condition arising out of the automobile accident?

A. Yes, sir.

Q. He gave him diathermy, I believe, wasn't it; deep therapy is the same thing, isn't it?

A. He treated him with diathermy, and perhaps some deep therapy. He advised him to go to an osteopath, stating that was the reason a medical man couldn't treat it with much satisfaction.

Q. Did he advise him to go to an osteopath after the automobile accident or after the accident down at Pocatello? I don't believe it is necessary to go into your notes.

A. I would say it was after Three Forks. I would rather wait and see.

Q. Your best memory is that it was after Three Forks?

A. Here it is. It was June 2nd, it was after, the next day, it was right after the accident on June 2nd, 1949. 'I went home,' then he said 'The next day then I went home to Billings. My right shoulder was stiff and sore. I consulted Dr. Soltero, M. D. He gave me three diathermy treatments for my shoulder. He told me it was a type of injury that a medical doctor could not do much with and that whenever it bothered me again, to go to a good osteopath and have it rubbed out. After that, I had a nurse rub it out when necessary. I did not need my shoulder in my work, so I just let it go.'

Q. Doctor, did you consider the fact that Dr. Soltero gave Mr. Hennessey diathermy treatments after the automobile accident, that so far as the right shoulder was again concerned, he gave him diathermy treatments again, substantially the same treatment following the accident at Pocatello, Idaho, have you considered that?

A. I didn't know Dr. Soltero gave him treatments after the automobile accident.

Q. He treated him on both occasions and the injury was substantially the same.

A. It wouldn't make any difference to me, and Mr. Hennessey didn't have anything else bothering him. It was just his shoulder. He never knew he had anything wrong with his abdomen. It was only when he got up after he had been in the hospital four days when he was told he had recovered from pneumonia. He got up on his feet and the thing came down in his left groin. He didn't have the slightest idea of that, and it has been brought out time and time again that the man did not know the thrombus was there, and my idea was to find out the reason for the formation of the thrombus and if the thrombus could form within the vena cava.

Q. Doctor, is it within the realm of possibility—I think you said that might take two years or more to develop—is it within the realm of possibility that the thrombus began to develop there at the time from the

rolling over of the automobile and hitting the steering wheel?

A. Well, I didn't think so; I don't think it was injury enough, but it is within the realm of possibility that he could have developed it after that, and it is within the realm of possibility that he didn't have anything wrong with him after that.

Q. As to what happened on January 7th, Doctor, there are many things within the realm of possibility, aren't there?

A. If you go into the realm of possibility, there are, but you see, after the thing develops, you don't have to wander into the realm of possibility because the condition is there. If it was in parts of his heart or kidneys, it would be within the realm of possibility, it would be within the realm of possibility that any kind of condition could have occurred, but it is not within the realm of possibility that there wouldn't be any symptoms of it.

Q. Doctor, it is possible, it is as possible as your theory, I mean, that arising out of the automobile accident there was an internal injury that created a thrombus that finally came loose on January 7th, 1950?

A. Yes, that is within the realm of possibility. The only difference would be the character of the injury. In the case of the fall by the man, that was an entirely different force that struck him than the automobile."

In a reading of Dr. Horst's testimony, which is too lengthy for a complete review here, it leads one to the conclusion that he, as the other doctors also testified, did not know the cause of the condition which arose. He stated that it is within the realm of possibility that the condition could have been caused by the automobile accident in which the plaintiff was involved, which is even more remote in time than the accident here occurring. It

was his opinion that the clot developed in the vena cava rather than in the aorta, as was testified to by Dr. Stokoe and Dr. Allard, and indeed this is necessary to sustain his theory based on the case history cited.

Dr. Allard stated (Tr. 395, 396):

“Q. And what, in your opinion, Doctor, was the cause of his difficulty?

A. It was my impression that Mr. Hennessey suffered an occlusion—first of all suffered a saddle embolus at the bifurcation of the aorta, and that on this same day, that slipped off the saddle and lodged in the arteries of the left lower extremity, producing an occlusion of the arterial supply there.

Q. Doctor, is there any way that you know that you can determine what the source of the embolus was?

A. In this particular case?

Q. Yes.

A. No, sir, checking over the various possibilities as to sites of origin of this embolus, there is nothing specific to indicate any definite site of origin and nothing to give us a clue or guide to this area.

Q. What, in fact, is an embolus, Doctor?

A. An embolus is a loose—in this particular case, a loose blood clot in a blood vessel. It is a broken off thrombus or a clot that is free.

Q. Yes. Would a thrombus that developed 20 years previously be as well attached for medical purposes to the walls of a blood vessel as would a thrombus five years old or six months old?

A. Yes, sir, I believe that for these various periods of time, six months upward, that the thrombus would have organized, or have changed into scar tissue, and by that time would be an integral part of the blood vessel, rather than an inert clot.”

Dr. Allard further testified that two weeks would be the maximum time that would expire before an occlusion

of the vessel occurred (Tr. 396, 397). Dr. Allard further testified that it would be impossible to have a clot that only partially blocked a blood vessel for any period of time (Tr. 407):

“Q. And it would be impossible, you believe, to have a clot that would only partially block a blood vessel?

A. Yes, for any period of time.”

Dr. Allard further testified (Tr. 410) that it was impossible for him to determine the site of origin of the embolus.

From all of this medical testimony, it is the contention of the defendant, that none of the doctors knew the cause of the thrombus or where it formed or when it formed. Each of them speculated on certain possibilities, two of them believing that the best possibility was a formation of the thrombus in the aorta, which is not compatible with the theory of causation as testified to by Dr. Horst, who believed the best possibility was that it was formed in the vena cava. In the point of time, it appears that there is no agreement among the doctors as to when the thrombus formed. Dr. Allard specified a maximum of two weeks, Dr. Stokoe a matter of days, and Dr. Horst testified that it was possible that it had its origin in the injuries sustained in the automobile accident. Dr. Horst started with the premise that there was an embolus, therefore there was a cause, and then speculated that a possible cause was the falling of the government employee upon the plaintiff.

It is to be observed in connection with Dr. Horst's testimony that while the condition to which he testified occurred January 7, 1950, he did not examine the plaintiff

until January 10, 1953, three years later (Tr. 212). Upon the bases of this fact alone, the trial Court was warranted in rejecting his testimony.

“While it may be that the science of medicine has reached the point where a doctor can form some opinion as to the condition of a tubercular patient ten years before he sees him, it nevertheless must be true that such opinions can scarcely be weighted in the same balance with that of a doctor who examined and treated him at the time.” *Rentfrow v. United States*, 10th Cir., 67 F. 2d, 747. See also 32 C. J. S. Evidence Section, 572 (page 419 et seq.), *United States v. Fotopulos*, 180 F. 2d, 631, 639.

CONCLUSION

We submit to the Court that the Findings of the Court were not “clearly erroneous”, and in fact the plaintiff has failed to prove by preponderance of the evidence the nature of the physical condition resulting in the condition complained of, in that he failed to establish the site of origin of the thrombus. He likewise failed to prove by preponderance of the evidence that in the point of time the embolus could and did result from a thrombus caused by accident occurring seven months earlier. The plaintiff failed to prove by preponderance of the evidence the causal connection between the condition which existed following January 7, 1950, and the accident which occurred on June 2, 1949, and he certainly failed to prove by preponderance of the evidence that the accident which occurred on June 2, 1949, was the proximate cause of the embolus which occurred on January 7, 1950. From the evidence it is as consistent to believe a causal connection from the in-

juries sustained in the automobile accident as the one complained of.

The judgment should be affirmed.

Respectfully submitted,

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Butte, Montana;

DALE F. GALLES,

Assistant U. S. Attorney,
Butte, Montana;

FRANK M. KERR,

Assistant U. S. Attorney,
Butte, Montana,

Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Montana

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FILED

NOV - 1 1956

PAUL P. O'BRIEN, CLERK



**United States
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No. 15063

**United States
Circuit Court of Appeals
For the Ninth Circuit**

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

ARGUMENT

It would appear from the argument set forth in Appellee's Brief that they are depending solely upon the fact that Appellant had had other diseases and injuries prior to the accident complained of in this Appeal to substantiate the finding of the trial court that the blood clot in question was not caused by the injury to Appellant in Pocatello, Idaho, on June 2, 1949. This matter has been very thoroughly discussed in Appellant's Brief on file in this Court. That Brief clearly points out the

legal, medical and scientific questions presented by this Appeal. We submit Appellee has not set forth any legal or medical reasons to support their position that the trial court's findings should be upheld. This is undoubtedly due to the fact that all of the evidence and law is against the Government's position.

It certainly cannot be seriously contended that the childhood diseases mentioned by Appellee had anything to do with the condition that occurred in Appellant's body and now exists and will continue for the rest of his natural life. The next point set forth by Appellee is the occurrence of pneumonia in 1934 and acute nephritis in 1934. The Appellee sets forth this disease as the possible cause of a condition that occurred 15 years later and in the very next paragraph of his Brief urges that Appellant's position is not tenable because the injuries occurred 7 months prior to the blood clot. We submit that this position of the Appellee is ridiculous on its face. Appellee then urges a recurrence of the nephritis in 1951 which we submit to be a false premise. The statement is based upon testimony adduced from the Appellant that according to Dr. Childs who was examiner for the Navy in Seattle that he had it. (Tr. p. 73.) This opinion of Dr. Childs' was based upon medical history rather than any objective findings. The Appellant had never been treated for nephritis from 1936 until the time of the trial. (Tr. p. 70.)

However, during the summer of 1941 the Appellant had taken the physical examination for the Air Corp

passing the same and flying for the C.A.A. during that time. Mere history of nephritis did not disqualify the Appellant at that time. (Tr. p. 31). From 1936 to 1941 the Appellant had been in sufficiently good health to be gainfully employed or carry a full college schedule without any necessity for medical treatment. No clinical findings of nephritis were made in the year 1941 and the Appellee has made no showing of the existence of the disease at that time. (Tr. pp. 31, 32.) We again submit that Appellee is contending that an occurrence of 15 years past could have caused the Appellant's condition but one of 7 months could not have. It becomes apparent that Appellee's sole effort is to cloud the issue.

The automobile accident next mentioned by Appellee occurred in 1947 and the Appellant was completely well at the end of six months. The next thing set forth is an accident by a Northwest Airlines plane in 1948 from which the Appellant's belly muscles were a little sore the next morning (Tr. p. 35) which condition was never noticeable after that morning even later the same day. These two incidents have certainly been tied up in no way whatsoever with the condition of Appellant. It is a reiteration of Appellee's claim "it is not remote for me but is for the Appellant."

We must bear in mind that at no time did the Defendant and Appellee plead any of these matters of defense affirmatively. The great part of the subject matter now relied upon by the Appellee was admitted by the trial court over the objections of counsel for the Appellant.

Not only are these matters completely remote and unconnected with the Appellant's condition but we submit they were inadmissible as matters of defense to begin with.

Barron and Holtzoff's Federal Practice and Procedure, Section 279, at page 499.

Counsel for Appellee after setting up this smoke screen then attempt to justify the trial court's error by quoting very minute extracts from the very extensive medical testimony in the case. In so doing they completely ignore the careful consideration given this question in Appellant's original Brief and completely ignore the medical text quoted therein. They hope in this summary fashion to completely ignore the exhaustive study of the situation set forth in Appellant's Brief.

An examination of the medical testimony will show, with respect to the said vascular catastrophe, that all medical witnesses agree that the crippled condition of the appellant was the result of the blood supply to his legs being shut off by an embolus that blocked the circulation; that all known sources of the emboli, except traumatic, were eliminated because of absence of disease and the presence of healthy lungs, healthy heart, healthy blood vessels, absence of infection sufficient to produce an embolus. Further, appellant's witness, Dr. Horst, a physician of many years experience and one who had made an exhaustive study of the problem and a careful personal examination of appellant, testified to a completely logical and reasonable explanation connect-

ing the fall of Livingston upon appellant as the proximate, efficient and producing cause of the traumatic damage to the blood vessels which resulted in the propagation of the thrombus and dislodgment of the emboli which resulted in this damage to appellant.

The Appellee concludes with the statement that the automobile accident is as closely related as the accident now before the court. As has been repeatedly noted in the record and in the Briefs the injury from the automobile accident was strictly to the shoulder and was completely healed in six months at the very outside. Prior to the occurrence now before this court and after the accident in Pocatello, Idaho it must be noted that the Appellant complained of pain in his upper abdomen for a number of months as well as the pain in the right shoulder for which the trial court allowed him some compensation. See Page 21 of Appellant's original Brief stating in part as follows:

"He also complained of pain in his upper abdomen of several months duration, which was worse on inspiration and on bending forward. This had become markedly aggravated the last few weeks before admission. (R. 132.) See also exhibit 1, St. Vincent's Hospital chart under record of complaints."

It is the contention of the Appellee that the trial court had the right to reject the testimony of Dr. Horst. We submit that the trial court did this arbitrarily and without right. As can be seen by the record the court of its own volition made efforts to discredit Dr. Horst's testimony in the course of the trial. This was not war-

ranted by the law applicable to the case.

"The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind."

Sec. 93-301-4, R.C.M. 1947.

"That in civil cases the affirmative of the issue must be proved and when the evidence is contradictory the decision must be made according to the preponderance of the evidence; that in criminal cases guilt must be established beyond a reasonable doubt."

Sec. 93-2001-1, R.C.M. 1947, Subdivision 5.

The law applicable to this case and which the trial court saw fit to ignore is set forth by the Montana Supreme Court as follows:

"The record contains no direct evidence from which it can be said that the injury was the proximate condition; this, not because of failure on the part of claimant properly to present his case, but because, on the frank admission of the doctors, no man on earth knows positively the exact cause of such an affliction in any given case; medical science has not advanced to a point where it can positively trace back from the effect and declare the cause of the disease in a given patient. But this fact alone need not bar the claimant from recovery, if, on the record, it can be said that he is entitled thereto.

The law does not require the impossible; it does not require demonstration or such a degree of proof as, excluding the possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in the unprejudiced mind. (Sec. 10491, Rev. Codes 1921.) A fact may be established by indirect evidence, or

that which tends to establish the fact by proving another which, though true, does not of itself conclusively establish that fact, but which afford as inference or presumption of its existence. (Sec. 10497, Id.) Evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in the unprejudiced mind. (Sec. 10500, Id.)

Further, the solution of any issue in a civil case may rest entirely upon circumstantial evidence; the law makes no distinction as to the probative value of this class of evidence and direct evidence, and, if the circumstantial evidence in this case furnishes support for the claimant's theory, and thus tends to exclude any other theory, it is sufficient. (citing cases.) In this class of cases the rule is that the burden of proving that the injury was the proximate cause of the condition of the claimant may be proved by circumstantial evidence or inferences having a substantial basis in the evidence. (1 Honnold on Workmen's Compensation, 266, citing cases from Michigan, Illinois, West Virginia and Massachusetts.)

Moffett vs. Bozeman Canning Co., et al, 95 Mont. 347 at page 358, 26 P. (2nd) 973.

On this point see cases cited in Appellant's original Brief.

CONCLUSION

In conclusion we state there is but one cause as has been repeatedly said which is responsible for the wrecked physical condition of the Appellant and that is the fall of Livingston upon him on June 2, 1949.

Trauma and trauma alone to the large blood vessels produce this extensive, propagated thrombus which slipped off and caused the damage.

The District Court's decision, being clearly errone-

ous, this court is appealed to for the relief which Appellant is entitled to in this case.

Respectfully submitted,

DOEPKER & HENNESSEY

By

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Attorneys for Appellant
312-316 Medical Arts Bldg.
Butte, Montana

No. 15064

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM F. HOLCOMB and IDRIS M. HOL-
COMB,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

APR -9 1956

No. 15064

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Northern District of California
Southern Division

No. 34443

WILLIAM F. HOLCOMB and IDRIS M. HOL-
COMB,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF
OVERPAYMENT OF INCOME TAXES

Plaintiffs for their cause of action against the
above-named defendant allege:

I.

This is an action against the United States of
America for recovery of an overpayment of inter-
nal revenue taxes, of which this Court has jurisdic-
tion under the provisions of 28 U.S.C., §1346(a)(1).

II.

At all times herein mentioned and now, plaintiffs
have been citizens of the United States of America
and residents of Alameda County, State of Califor-
nia. At all times herein mentioned plaintiffs kept
their books of account and filed their income tax
returns on a calendar year basis.

III.

The nature of plaintiffs' claim is for the recovery of \$8,293.70 in principal amount of income taxes, erroneously and excessively assessed and collected from plaintiffs for the calendar year 1951 together with interest thereon.

IV.

The facts upon which said claim is based are as follows:

(a) At all times during the calendar year 1951 plaintiffs were married.

(b) Plaintiffs filed separate returns for the calendar year 1951. Plaintiff William F. Holcomb in his separate return for said year reported a net income of \$53,887.39 and paid an income tax to defendant of \$29,661.54. Subsequently, upon the audit of William F. Holcomb's separate return, his net income for the calendar year 1951 was determined to be \$68,880.59 and an additional tax of \$11,493.32 was assessed and on or about May 16, 1954, said plaintiff paid said additional tax together with interest thereon. Plaintiff Idris M. Holcomb in her separate return for the calendar year 1951 reported a net income of \$1,553.31 and paid to defendant an income tax of \$72.08, making a total income tax paid to the defendant by both plaintiffs for the calendar year 1951 the sum of \$41,226.94. Plaintiffs have paid all amounts previously assessed against them as income tax for the calendar year 1951.

(c) On or about June 23, 1954, plaintiffs filed a joint return for the year 1951 as permitted by

§51(g) of the Internal Revenue Code then in force, showing a total income tax liability of \$32,933.24. Thus plaintiffs have erroneously overpaid their income tax for said year by the amount of \$8,293.70.

(d) Concurrently with the filing of said joint return and within the period within which such claims could be legally filed under §322 of the Internal Revenue Code then in force, plaintiffs also filed with the Director of Internal Revenue in the City of San Francisco, State of California, a claim for refund for said \$8,293.70, erroneously and excessively collected by defendant from plaintiffs for the calendar year 1951, together with interest as allowed by law. A copy of said claim for refund is attached hereto marked Exhibit "A" and made a part hereof.

(e) More than six (6) months have expired since the filing of the aforesaid claim for refund on or about June 23, 1954, and the commencement of this suit, and no notice of the disallowance of said claim has been mailed to plaintiffs by registered mail by the Commissioner of Internal Revenue. Under date of January 10, 1954, plaintiffs did receive a letter from the District Director of Internal Revenue, by ordinary mail, disallowing said claim for refund in full. A true copy of said letter is attached hereto, marked Exhibit "B" and made a part hereof.

V.

The sum of \$8,293.70, erroneously and excessively collected by defendant from plaintiffs for the calen-

dar year 1951, together with interest thereon, is now due and owing to plaintiffs by defendant, but defendant refuses to refund to plaintiffs said sum or any part thereof.

VI.

By virtue of the aforesaid, defendant became and is now indebted to the plaintiffs in the amount of \$8,293.70 with interest as provided by law.

Wherefore, plaintiffs William F. Holcomb and Idris M. Holcomb pray for judgment in their favor and against the defendant for the sum of \$8,293.70 together with interest on said sum as permitted by law, and for such other and further relief as the Court may find just in the premises.

/s/ ROY A. BRONSON,

/s/ MAX WEINGARTEN,

BRONSON, BRONSON &
McKINNON,

Attorneys for Plaintiffs,

By /s/ ROY A. BRONSON.

Form 843,
U. S. Treasury Department
Internal Revenue Service
(Revised June, 1951)

CLAIM

To Be Filed with the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: [Blank.]

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: William F. and Idris M. Holcomb.

Street address: c/o Bronson. Bronson & McKinnon, 220 Bush Street.

City, postal zone number, and state: San Francisco 4, California.

1. District in which return (if any) was filed: First Cal. District, San Francisco, Calif.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from 1/1, 1951, to 12/31, 1951.

3. Kind of tax: Income Tax.
4. Amount of assessment, \$41,226.94; dates of payment, 1/14/1952 and 5/17/1954.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: with interest, \$8,293.70.
7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

(See Attached Statement)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: June 17, 1954.

/s/ WILLIAM F. HOLCOMB,

By /s/ MAX WEINGARTEN,

Attorney in Fact,

/s/ MRS. IDRIS M. HOLCOMB.

William F. and Idris M. Holcomb

On August 13, 1951, an interlocutory decree was entered by the Superior Court in and for the County of Alameda, State of California, in the divorce proceeding Holcomb v. Holcomb then pending between the taxpayers which action was numbered 229369.

The final decree was only obtained on or about August 18, 1952.

The taxpayers in the mistaken belief that they could not file a joint return after the interlocutory decree had been entered filed separate returns for the calendar year 1951.

The husband, William F. Holcomb, in his separate return for the year 1951 reported a net income of \$53,887.39, paying thereon a tax of \$29,-661.54. Subsequently, upon the audit of the husband's return, his net income for the year 1951 was found to be \$68,880.59 and an additional tax of \$11,493.32 was assessed. William F. Holcomb consented to said assessment and on or about May 17, 1954, paid said amount of \$11,493.32 plus the interest due. The total tax paid by the husband for the year 1951 amounts, therefore, to \$41,154.86

The wife, Idris M. Holcomb, in her separate return reported a net income of \$1,553.31, paying thereon a tax of . . . 72.08

The total tax paid by husband and wife in their separate returns for the year 1951 amounts to \$41,226.94
(See enclosed Schedule)

Taxpayers' view that they could not file a joint return for the year 1951 was erroneous. Under California law, an interlocutory decree does not terminate the matrimonial status of the parties and they could therefore file a joint return for the year 1951. (Marriner S. Eccles, 19 T.C. 1049, aff'd C.C.A. 4th,

Dec. 9, 1953; Alice Humphreys Evans, 19 T.C. 1102, aff'd C.C.A. 10th, Mar. 13, 1954).

Taxpayers now file a joint return for the year 1951 under Sec. 51(g) of the Internal Revenue Code, which joint return is enclosed herewith showing a total tax liability of \$32,933.24. The difference between this sum and the sum of \$41,226.94, which the taxpayers have paid with their separate returns, is the sum of \$8,293.70, the refund of which is claimed herewith.

SCHEDULE

William F. and Idris M. Holcomb Income and Deductions for 1951

Income	Wife's Separate Return	Husband's Separate Return	Total
Dividends	\$ 693.25	\$ 674.88	\$ 1,368.13
Interest	2,396.06	2,156.52	4,552.58
Rents and Royalties		2,606.63	2,606.63
Net Gain from Sale of Capital Assets	226.60		226.60
Partnership Income		66,565.22	66,565.22
Adjusted Gross Income	\$ 3,315.91	\$72,003.25	\$75,319.16
Deductions:			
Contributions	\$ 140.00	\$ 300.00	\$ 440.00
Taxes	951.59	2,734.86	3,686.45
Medical Expenses*			
Misc. Deductions		87.80	87.80
Total Deductions	\$ 1,091.59	\$ 3,122.66	\$ 4,214.25
Net Income			\$71,104.91

*The wife deducted \$671.01 on her separate return for medical expenses, which deduction is not being considered in the joint return.

U. S. INDIVIDUAL INCOME TAX RETURN.
FOR CALENDAR YEAR 1951

1951

or taxable year beginning 1951 and ending 1951

Do not write in these spaces

Name **WILLIAM F. and IDRIS M. HOLCOMB**
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)HOME ADDRESS **c/o BRONSON, BRONSON & MCKINNON**
(PLEASE PRINT. Street and number or rural route)**220 BUSH STREET, SAN FRANCISCO 4, CALIF.**

(City, town, or post office)

(Postal zone number)

(State)

Social Security No.

Occupation

Serial
No.

(Cashier's Stamp)

List your name. If your wife (or husband) had no income, or if this is a joint return, list also her (or his) name.

A. **WILLIAM F. HOLCOMB**B. **IDRIS M. HOLCOMB**

(Your wife's name—do not list if exemption is claimed on another return)

C. List names of your children (including stepchildren and legally adopted children) with 1951 gross incomes of less than \$600 who received more than one-half of their support from you in 1951. See Instructions.

Check below if at the end of your taxable year you or your wife were—

65 or over ☐ Blind ☐65 or over ☐ Blind ☐

On lines A and B below—

if neither 65 nor blind write the figure 1

if either 65 or blind write the figure 2

if both 65 and blind write the figure 3

Number of exemptions for you

Number of her (or his) exemptions

Name—and address if different from yours

Enter number of children listed

D. Enter number of exemptions claimed for close relatives listed in Schedule J on page 2

E. Enter total number of exemptions claimed in A to D above

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1951, before pay-roll deductions. Persons claiming traveling or reimbursed expenses, see Instructions.

Prev. Employer's Name	Where Employed (City and State)	Income Tax Withheld	Total Wages
		\$	\$

Enter totals \$

\$

If you received dividends, interest, or any other income, give details on page 2 and enter the total here

Add income shown in items 2 and 3, and enter the total here

\$ 75,319 16

YOUR INCOME WAS LESS THAN \$5,000.—Use the tax table on page 4 unless you itemize deductions. The table allows you 10 percent of your income for charitable contributions, interest, taxes, medical expenses, etc. If your deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

INCOME WAS \$5,000 OR MORE.—Compute tax on page 3. Use standard deduction or itemize deductions, whichever to your advantage.

(A) Enter your tax from table on page 4, or from line 13, page 3

(B) Enter your self-employment tax from line 31, separate Schedule C

\$

\$

Enter total here →

\$ 32,933 24

How much have you paid on your 1951 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2

(B) By payments on 1951

\$

\$

41,226 94

Enter total here →

41,226 94

If your tax (item 5) is larger than payments (item 6), enter

balance of tax due here. This balance must be paid in full with return

\$

If your payments (item 6) are larger than your tax (item 5), enter the overpayment here

\$ 8,293 70

Enter amount of item 8 you want \$ 8,293.70

(Refunded)

(Credited on 1952 estimated tax)

Did you have any prior year Federal tax for which you have been billed? (Yes or No) NO Is your wife (or husband) a separate return for 1951? (Yes or No) If "yes," write her (or his) name

Did you file a return for a prior year, state latest year 1950 Where filed?

FIRST CALIFORNIA DISTRICT

Collector's office did you pay amount claimed in item 6 (B), above?

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been prepared by me and to the best of my knowledge and belief is a true, correct, and complete return.

6/22/54

Max Weingarten

6/17/54

Max Weingarten, Attorney in Fact

If person, other than taxpayer, preparing this return

(Date)

(Signature of taxpayer)

N. BRONSON & MCKINNON

s/ Mrs. Idris M. Holcomb

6/19/54

(Name of firm or employer, if any)

(Signature of taxpayer's wife or husband if this is a joint return)

(Date)

split-income benefits, husband and wife must include all their income and, even though only one has income, BOTH MUST SIGN.

16-65304-1

Schedule A.—INCOME FROM DIVIDENDS

Page 2

Name of corporation declaring dividend	Amount	Name of corporation declaring dividend	Amount
SCHEDULE	\$ A		\$
			Enter total here → \$ 1,368 13

Schedule B.—INCOME FROM INTEREST

Name of payer	Amount	Name of payer	Amount
SCHEDULE	\$ A		\$
			Enter total here → \$ 4,552 58

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION, FARMING, AND PARTNERSHIP

Business profit (or loss) from separate Schedule C, line 24	\$
Business profit (or loss) from separate schedule, Form 1040F	
Partnership, etc., profit (or loss) from Form 1065, Schedule J, Column 10	
Total of lines 1, 2, 3	\$
Less: Net operating loss deduction (attach statement)	
Profit (or loss) (line 4 less line 5)	\$ 66,565 22

Schedule D.—NET GAIN OR LOSS FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

Net gain or exchange of capital assets (from separate Schedule D)	\$ 226 60
Net loss or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM ANNUITIES OR PENSIONS

1. Amount of annuity (amount you paid)	\$	4. Amount received this year	\$
2. Amount received tax-free in past years		5. Excess of line 4 over line 3	
3. Remainder of cost (line 1 less line 2)	\$	6. Enter line 5, or 3 percent of line 1, whichever is greater, but not more than line 4	

Schedule F.—INCOME FROM RENTS AND ROYALTIES

Kind and location of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule H)	4. Repairs (explain in Schedule I)	5. Other expenses (Itemize in Schedule I)
	\$	\$	\$	\$
	\$ 5,986 38	\$ 1,690 00	\$ 7 59	\$ 1,682 16
Profit (or loss) (column 2 less sum of columns 3, 4, and 5)				

Schedule G.—INCOME FROM ESTATES AND TRUSTS AND OTHER SOURCES

1. Name of estate or trust	(Name)	(Address)	\$
2. Other sources (state nature)			
			Enter total here → \$ 75,319 16

Schedule H.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SEPARATE SCHEDULE C AND SCHEDULE F

Property (if buildings, state material or method). Exclude land and other nondepreciable property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed (or allowable) in prior years	5. Remaining cost or other basis to be recovered	6. Life used in accumulating depreciation	7. Estimated life from beginning of year	8. Depreciation allowable this year
		\$	\$	\$			\$ 1,690 00

Schedule I.—EXPLANATION OF LINES 6, 17, AND 20, SEPARATE SCHEDULE C AND COLUMNS 4 AND 5 OF SCHEDULE F

Explanation	Amount	Line or Column No.	Explanation	Amount
	\$ 7 59			\$ 1,682 16

Schedule J.—EXEMPTIONS FOR CLOSE RELATIVES—(See instructions)

Name of dependent relative. Also give address if different from yours	2. Relationship	3. Did dependent during 1951—			4. If answer to either 3(b) or 3(c) is "No" enter amount spent for dependent's support in 1951 by— You (and your wife if this is a joint return) Other, and by dependent from own funds
		(a) Have gross income of \$500 or more?	(b) Reside in your home?	(c) Receive entire support from you?	
E. DUNN	MOTHER	NO	YES	YES	\$ \$

Enter here and as item 1D, page 1, the number of close relatives claimed above

Describe deductions and state to whom paid. If more space is needed, attach additional sheets.		\$	
SEE SCHEDULE A		\$	
Allowable Contributions (not in excess of 15 percent of item 4, page 1)		\$	440 00
		\$	
Total Interest		\$	
SEE SCHEDULE A		\$	
Total Taxes			3,686 45
		\$	
Total Allowable Losses (not compensated by insurance or otherwise)		\$	
		\$	
Net Expenses (not compensated by insurance or otherwise)		\$	
Enter 5 percent of item 4, page 1, and subtract from Net Expenses		\$	
Allowable Medical and Dental Expenses. See Instructions for limitation		\$	
Accounting fee		\$	75 00
Deposit Box for Securities		\$	12 80
Total Miscellaneous Deductions			87 80
Total Deductions		\$	4,214 25
TAX COMPUTATION FOR CALENDAR YEAR 1951 (For Other Taxable Years Attach Form 1040FY)			
Amount shown in item 4, page 1. This is your Adjusted Gross Income		\$	75,319 16
Deductions are itemized above, enter total of such deductions. If deductions are not itemized			
line 1, above, is \$5,000 or more: (a) married persons filing separately enter \$500, (b) all			
others enter 10 percent of line 1, but not more than \$1,000			4,214 25
Subtract line 2 from line 1. Enter the difference here. This is your Net Income		\$	71,104 91
Multiply \$600 by total number of exemptions claimed in item 1E, page 1. Enter total here			1,800 00
Subtract line 4 from line 3. Enter difference here. (If line 1 includes partially tax-exempt		\$	69,304 91
rest, see instructions)		\$	
If not more than \$2,000—Enter 20.4 percent of amount on line 5 and disregard lines 7, 8, and 9		\$	
This is your normal tax and surtax		\$	
If more than \$2,000 and you are a single person or a married person filing separately—Use tax rates on last page		\$	
of instructions to figure tax on amount on line 5. This is your normal tax and surtax		\$	
If more than \$2,000 and you are filing a joint return—		\$	
Enter here one-half of the amount of line 5		\$	34,652.45
Tax rates on last page of instructions to figure tax on amount on line 8 (a)		\$	16,466.62
Multiply amount on line 8 (b) by 2. This is your normal tax and surtax		\$	32,933 24
If alternative tax computation is made, enter here tax on back of separate Schedule D		\$	
Lines 10, 11, and 12, and copy on line 13 the same figure you entered on line 6, 7, 8 (c), or 9, unless you used itemized deductions		\$	
Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)		\$	
Enter here any income tax paid at source on tax-free covenant bond interest		\$	
Add figures on lines 10 and 11 and enter the total here		\$	
Subtract line 12 from line 6, 7, 8 (c), or 9. Enter difference here and as item 5 (A), page 1.		\$	32,933 24
This is your tax		\$	

SCHEDULE "A"

William F. and Idris M. Holcomb

Calendar Year 1951

Dividends

Husband:

Affiliated Fund	\$ 209.88	
Portland G & E	90.00	
Central Bldg & Loan	175.00	
Cal. Water	200.00	\$ 674.88

Wife:

Central Bldg. & Loan	175.00	
Cal. Water	134.05	
Cal. Water & Tel.	60.00	
Toledo Edison	77.00	
Affiliated Fund	247.20	693.25

Total Dividends	\$ 1,368.13
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Interest Income

Husband:

Central Bldg. & Loan	\$ 612.88	
Guaranty Bldg. & Loan	165.13	
Fidelity Bldg. & Loan	485.16	
First Fed. Bldg.	625.84	
Matt Laurence	267.51	2,156.52

Wife:

San Francisco Bank	318.72	
Oakland Fed. Sav. & Loan	298.10	
American Trust Co.	294.81	
Matt Laurence	1,484.43	2,396.06

Total Interest Income	\$ 4,552.58
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Contributions

American Red Cross	\$ 170.00
St. Paul's Epis. Church, Oakland	100.00
Community Chest	50.00
Disabled Veterans, Cancer Fund, Infantile Paralysis, Heart Fund, etc. ..	110.00
Misc. small donations	10.00

Total Contributions	\$ 440.00
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Taxes

Real estate and personal property taxes	\$ 151.40
State and City sales tax	275.00
State income tax	2,343.46
Taxes—City of Oakland	646.85
Taxes—City of Piedmont	199.95
Car License	36.00
State Gasoline Tax	28.00
Tax on Oregon lot	5.79

Total Taxes	\$ 3,686.45
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Note: For more detailed information on any item on this joint tax return, see the separate returns previously filed by husband and wife for the year 1951.

Exhibit "A"

U. S. Treasury Department
Internal Revenue Service
100 McAlister Street
San Francisco 2, California

Jan. 10, 1955.

Chief, Audit Div'n.

A:R :30-D Rm. 1403A

Claim(s) for Refund

Form No. 843, Year 1951, Amount \$8,293.70.

William F. and Idris M. Holcomb,
220 Bush Street,
c/o Branson, Bronson & McKinnon,
San Francisco 4, California.

Dear Mr. and Mrs. Holcomb:

The attached report, which takes into consideration the claim(s) for refund designated above, has been carefully reviewed by this office and discloses no grounds for reduction in tax liability as a result of the examination of your income tax return for the year above mentioned.

If you do not accept the findings, you may, within 30 days from the date of this letter, file a protest in accordance with the enclosed instructions. Any protest filed will be given careful consideration and, if requested, a conference will be granted by the Appellate Division of the Regional Commissioner's office.

Prompt execution and return of the enclosed receipt form indicating your position with respect to the findings disclosed by the report will be greatly appreciated.

Important: It is essential that communications transmitting protests or agreements relative to this letter be addressed to the District Director of Internal Revenue, Audit Division, 100 McAlister Street, San Francisco 2, California.

Very truly yours,

GLEN T. JAMISON,

District Director of Internal
Revenue.

By /s/ HENRY J. BRUL,
Chief, Audit Division.

Enclosures:

Report of Examination

Receipt Form

SF #72

Exhibit "B"

Preliminary Statement

Name of Taxpayer: William F. and Idris M. Holcomb.

Examining Officer: L. Rubin.

Date of Report: Nov. 15, 1954.

Summary of Proposed Adjustments

Year Ended: Dec. 31, 1954.

Income Tax:

Deficiency: No Change.

Overassessment: [Blank.]

Agreement Secured: No.

Name of person with whom findings discussed: Mr. Weingarten, attorney-in-fact of taxpayer.

Principal causes of changes, and other information:

Claim for refund of 1951 income taxes paid, dated June 17, 1954, is disallowed in full. Basis of claim was made on two tax court cases:

Marriner S. Eccles, 19 T.C. 1049

Alice Humphreys Evans, 19 T.C. 1102

The Commissioner of Internal Revenue does not acquiesce in either of the above-named decisions. See page 8, Cumulative Bulletin 1953-2.

Under provisions of I.T. 3942, CB 1949-1, Page 69, for purposes of filing a joint return (Section 51(b) of the 1939 Internal Revenue Code), the parties named in an interlocutory decree of divorce in the State of California are not considered married.

Mr. Weingarten, acting for Dr. and Mrs. Holcomb under power of attorney, in a telephone conversation on Nov. 12, 1954, has waived the privilege of informal conference with Group Supervisor.

[Endorsed]: Filed Feb. 7, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, and for its answer to the complaint of the plaintiffs, admits, denies and alleges as follows:

1. Admits the allegations of paragraph I, except it is denied that the plaintiffs in fact made an overpayment of internal revenue taxes for the year in question.

2. Admits the allegations of paragraph II.

3. Denies the allegations of paragraph III, except it is admitted that the plaintiffs' claim is for the recovery of the amount stated.

4. With respect to the allegations contained in the various subparagraphs of paragraph IV of the complaint, the defendant admits, denies and alleges as follows:

(a) Denied.

(b) Admits the allegations pertaining to the separate return of plaintiff William F. Holcomb for the year in question, but defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to the separate return filed by the plaintiff Idris M. Holcomb for the year in question.

(c) Admitted, except it is denied that plaintiffs made any overpayment of their income tax for the year in question.

(d) Admitted, except defendant denies the implication that the sum in question was erroneously or excessively collected from plaintiffs. Defendant further denies the allegations and statements contained in Exhibit "A", attached to the complaint, admitting, however, that Exhibit "A" is a fair copy of the claim for refund filed by plaintiffs, as alleged.

(e) Admitted.

5. Denies the allegations of paragraph V.

6. Denies the allegations of paragraph VI.

Wherefore, defendant demands judgment in its favor, dismissing the complaint and awarding it all lawful costs and disbursements of this action.

LLOYD H. BURKE,

United States Attorney,

By /s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for
Defendant.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

STIPULATED FACTS

It is hereby stipulated and agreed by and between all the parties in the above-entitled cause, by their respective attorneys that the following facts are correct, without prejudice to the right of any party to object to the relevancy or materiality of such facts and subject to the right of any party to introduce additional evidence not inconsistent herewith:

1. The sole issue involved is whether under the facts of this case, plaintiffs were entitled to file a joint return for the year 1951 pursuant to the provisions of Section 51 of the Internal Revenue Code of 1939.

2. William F. Holcomb and Idris M. Holcomb, the plaintiffs herein, were married on or about December 1, 1923, and have lived together as husband and wife until approximately June 28, 1950.

3. On or about June 28, 1950, said William F. Holcomb and Idris M. Holcomb separated and have been living separate and apart ever since.

4. On or about June 28, 1950, William F. Holcomb and Idris M. Holcomb entered into and executed a property settlement agreement, settling their respective rights in and to the community property and in and to the separate property of each. Said agreement is set forth in full in the Findings of Facts and Conclusions of Law entered in the divorce action described in the next paragraph. A true copy of said Findings of Facts and Conclusions of Law is attached hereto as Exhibit 1.

5. On or about September 28, 1950, Idris M. Holcomb brought an action for divorce from William F. Holcomb in the Superior Court of the State of California, in and for the County of Alameda, which action is numbered 229369, alleging extreme cruelty as ground for divorce. In said action Idris M. Holcomb also alleged that her signature to the property settlement of June 28, 1950, had been obtained by William F. Holcomb by threats, undue influence, and fraudulent representations and said Idris M. Holcomb asked the Court to declare said agreement invalid. All these allegations were denied by William F. Holcomb in his answer and cross-complaint to the complaint for divorce.

6. On or about October 4, 1950, Idris M. Holcomb filed a petition with said Superior Court, asking for an award of alimony pendente lite, and on

or about October 24, 1950, said Court signed an order, ordering said William F. Holcomb to pay to Idris M. Holcomb \$550.00 per month as alimony pendente lite, beginning with November 1, 1950.

7. During the calendar year 1951 and prior to the granting of the interlocutory decree of divorce, said William F. Holcomb paid to Idris M. Holcomb the sum of \$4,840.00 as alimony pendente lite pursuant to said Court decree and treated this amount as a deduction on his Federal income tax return for the year 1951. Idris M. Holcomb did not include said sum of \$4,840.00 as part of her gross income in her Federal income tax return for 1951.

8. On or about August 13, 1951, the Court concluded after a lengthy trial that Idris M. Holcomb was entitled to a decree of divorce and granted her an interlocutory decree of divorce. Said decree also adjudged that the property settlement date June 28, 1950, was valid and binding. A correct copy of said interlocutory decree of divorce is attached hereto as Exhibit 2. Neither alimony, nor support or maintenance, nor any payment whatsoever was awarded by said decree to Idris M. Holcomb and no such payments were made by William F. Holcomb after August 13, 1951.

9. On August 18, 1952, the said Superior Court entered a final judgment of divorce, correct copy of which is attached hereto as Exhibit 3.

10. Plaintiffs filed separate returns for the calendar year 1951. Plaintiff William F. Holcomb in

his separate return for said year reported a net income of \$53,887.39 and paid thereon an income tax to defendant of \$29,661.54. Subsequently, upon the audit of William F. Holcomb's separate return, his net income for the calendar year 1951 was determined to be \$68,880.59 and an additional tax of \$11,493.32 was assessed and on or about May 16, 1954, said plaintiff paid said additional tax together with interest thereon. Plaintiff Idris M. Holcomb in her separate return for the calendar year 1951 reported a net income of \$1,553.31 and paid to defendant an income tax of \$72.08, making a total income tax paid to the defendant by both plaintiffs for the calendar year 1951 the sum of \$41,226.94.

11. One of the items which caused the increase of the taxable income of William F. Holcomb for 1951 from \$53,887.39 to \$68,880.59 was the disallowance of the deduction in the amount of \$4,840.00 paid by William F. Holcomb as alimony pendente lite to Idris M. Holcomb during 1951.

12. On or about June 23, 1954, plaintiffs filed a joint return for the year 1951 showing a total income tax liability of \$32,933.24. A true copy of said return is attached to the complaint as part of Exhibit A of said complaint. Prior to filing said joint return plaintiffs paid all amounts previously assessed against them as income tax for the calendar year 1951.

13. Concurrently, with the filing of said joint re-

turn and within the period within which such claims could be legally filed under Section 322 of the Internal Revenue Code then in force, plaintiffs also filed with the Director of Internal Revenue in the City of San Francisco, State of California, a claim for refund for \$8,293.70, a true copy of which is attached to the complaint as part of Exhibit A of said complaint.

14. In the event judgment is ordered in favor of plaintiffs, or either of them, the parties shall agree upon the amount of the judgment and in the absence of such agreement, any party on notice may introduce evidence as to the amount of such judgment.

Dated this 6th day of July, 1955.

/s/ ROY A. BRONSON,

/s/ MAX WEINGARTEN,

BRONSON, BRONSON &
McKINNON,

Attorneys for Plaintiffs.

LLOYD A. BURKE,

United States Attorney,

By /s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for
Defendant.

Exhibit 1

In the Superior Court of the State of California,
in and for the County of Alameda

No. 229369 Dept. 11

IDRIS M. HOLCOMB,

Plaintiff,

vs.

WILLIAM F. HOLCOMB,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 17th day of April 1, 1951, before the above-entitled Court, Department No. 11 thereof, Honorable Cecil Mosbacher, Judge, presiding, sitting without a jury, plaintiff appearing by her attorneys, Myron Harris, Esq., and R. J. Darter, Esq., and defendant appearing by his attorneys, Messrs. Rickson, Freeman & Johnson and Messrs. Bronson, Bronson & McKinnon; and the trial of said action proceeded on said day and succeeding days upon the issues presented by the complaint and supplemental complaint and the answers thereto, defendant's cross-complaint having been dismissed in open Court; and the Court having heard the evidence introduced by and on behalf of the respective parties and the arguments of counsel, and the cause having been submitted to the Court for its decision on the 25th day of April, 1951, and the Court being now fully advised in the premises:

Comes now the Court and makes and files its findings of fact and conclusions of law, as follows, to wit:

Findings of Fact

I.

Plaintiff and defendant intermarried on the first day of December, 1923, in the City of New York, State of New York, and ever since have been and now are husband and wife, respectively.

II.

Plaintiff and defendant separated on the 28th day of June, 1950, and ever since have been and now are living separate and apart.

III.

Plaintiff was at the time of the commencement of this action, and for more than one year continuously next prior thereto, a resident of the County of Alameda, State of California.

IV.

The allegations contained in paragraph VII of the complaint and paragraph II of the supplemental complaint herein are true.

V.

On the 28th day of June, 1950, plaintiff and defendant, as a result of disputes and differences and a long period of domestic infelicities, were about to enter into an immediate separation, and on said date they entered into and executed a property settlement agreement (in two counterparts) settling and disposing of the rights of each in and to the community property of the parties and in and to the

separate property of each, which said agreement is in words and figures as follows, to wit:

“Property Settlement Agreement

“This agreement, made and executed in duplicate this 28th day of June, 1950, by and between Idris M. Holcomb, also known as I. M. Holcomb, Party of the First Part, hereinafter referred to as the wife, and William F. Holcomb, also known as W. F. Holcomb, Party of the Second Part, hereinafter referred to as the husband, both residents of the City of Oakland, County of Alameda, State of California.

Witnesseth:

“Whereas, the parties hereto were lawfully married on or about the 1st day of December, 1923, at New York City, New York, and ever since have been and now are husband and wife; and

“Whereas, in consequence of disputes and unhappy differences, the parties separated on or about June 13, 1950, and now are living separate and apart, and since their said separation have agreed and now intend to live separate and apart during their natural lives; and

“Whereas, the parties during their marriage have accumulated and now own the following community property, which each of them values at the sum or amount hereinafter set out opposite the respective piece or article of property, and where there is no value set forth after or opposite any of the below-listed bank and building and loan associations accounts, the value thereof shall and it is

hereby agreed to be the amount of cash therein as of the date of the signing of this agreement, and where there is no value set forth after or opposite any of the the below-listed shares of corporation stock, the value thereof shall and it is hereby agreed to be the market value thereof at the end of the day upon which this agreement is signed by these parties:

(a) House and lot located at and known and numbered as 305 Vernon Street, Oakland, California, worth approximately \$22,500.00;

(b) House and lot located at and known and numbered as 572 Boulevard Way, Piedmont, California, worth approximately \$10,000.00;

(c) Life insurance issued upon Second Party's life, wherein First Party is the beneficiary thereunder, in the following life insurance companies or associations, and in the following amounts:

A. U. S. Government\$10,000.00

B. Travelers Insurance Company ..\$10,000.00

C. Navy Mutual Aid Association...\$ 7,500.00

D. Equitable Life Insurance Co...\$ 5,000.00;

(d) Buildings and lot located at and known and numbered as 2930 and 2938 Webster Street, Oakland, California, of the approximate value of \$30,000.00;

(e) An auxiliary schooner, known and registered as the Landfall II, worth approximately \$10,500.00;

(f) Bank and savings accounts in the following banks and savings and loan associations:

A. Central Building and Loan Association of Alameda, California,

B. San Francisco Bank of San Francisco and Oakland, California,

C. American Trust Company, Oakland, California,

D. Fidelity Guaranty Building and Loan Association of Berkeley, California,

E. Guaranty Building and Loan Association of Oakland, California,

F. Oakland Federal Building and Loan Association of Oakland, California, and

G. First Federal Savings and Loan Association of San Diego, California;

(g) Shares of corporation stock in the following corporations and in the following number of shares:

A. 100 shares of Portland General Electric Company,

B. 20 shares of Central Building and Loan Association,

C. 2,061 shares of Affiliated Fund,

D. 100 shares of California Water Service,

E. 42 shares of Monarch Royalty Company, and

F. 1,000 shares of Continental Mines;

(h) Promissory notes, loans, mortgages, or deeds

of trust in the following amounts owed by the following persons to either or both of these parties:

A. Loan to Matt Laurence in the sum of \$35,000.00,

B. Loan to Matt Laurence in the sum of \$10,000.00,

C. Loan to J. Pierce Rex in the sum of \$10,000.00;

(i) Miscellaneous U. S. Government bonds in the approximate sum of \$10,200.00, the maturity date thereof being due at various times between 1951 and 1957;

(j) Two automobiles (a 1948 Chrysler sedan and a 1949 Chrysler sedan) the value of which shall be considered by these parties to be the standard California "Blue Book" value of the same as of the date of the signing of this agreement;

(k) Possible other miscellaneous community property of these parties, which the parties hereto do not now recall, but which, if discovered or later recalled, shall be valued by these parties upon a basis agreeable to both of them, and the same shall in no way set aside or change this agreement; for these parties hereby agree that any such hereafter discovered community property shall be equally divided by and between them; and

"Whereas, it is the mutual wish and desire of said parties that a full and final adjustment of all of their property rights, interests, and claims be had, settled, and determined by said parties in this Agreement (this agreement is not merely a separa-

tion agreement) and this Agreement is a full, final, and unconditional agreement forever fixing, settling, defining, determining, and ending the property relations of each party hereto with the other;

“Now, Therefore, it is agreed that in consideration of the mutual promises, agreements, and covenants contained herein, it is covenanted, agreed, and promised by each party hereto, to and with the other party hereto, as follows:

“That all of the aforementioned and any other community property of these parties shall be equally divided by and between them, upon a dollar-value basis; so that each will receive an equal share thereof; and that each of them shall receive certain specific pieces of said property and the value of the same to be used in computing his or her remaining share of said community property shall be the same as hereinabove set forth; and

“In consideration of the premises, First Party hereby grants, conveys, transfers, sets over and delivers to Second Party as and for his own, sole, absolute, separate, and independent property all of the real and personal property mentioned, listed, and set forth in previous paragraphs (d) and (e) hereof; and Second Party in consideration of the premises hereby grants, conveys, transfers, sets over and delivers to First Party as and for her own, sole, absolute, separate, and independent property all of the real and personal property mentioned, listed, and set forth in previous paragraphs (a),

(b), and (c), including all of said life insurance; and the remaining community property of these parties shall be divided between them as herein agreed by them; so that the value of the total community property received by each hereunder shall be equal in dollar-value after the distribution agreed upon herein has been accomplished.

“Each party hereto shall retain as his or her own, sole, and separate property all of his or her separate property now in his or her possession, which either party had at the time of marriage or subsequently inherited and the same is as follows and shall not be divided between these parties:

First Party:

One \$1,000.00 bond of the Parish of Ouichita, Louisiana, due in 1956;

Second Party:

Twenty acres of farming land located in San Diego County, California, and his interest in the estate of Second Party's father, S. F. Holcomb, Jr., deceased.

“It is further agreed between these parties, husband and wife, as follows:

“First: That this agreement is voluntarily and freely entered into by both parties for the purpose of forever settling and adjusting the property rights of the parties hereto as the same may now or hereafter exist in regard to each other; and that, while

this agreement has not been entered into as an inducement to either party to institute divorce proceedings, if divorce proceedings are subsequently instituted by either party hereto or are now pending between them, it is agreed by these parties that their property rights, shall be determined and adjudged in any divorce or separation proceedings in accordance with the terms of this agreement.

“Second: That, except as herein specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts, or obligations of any kind or character incurred by the other from and after this date. Further, the wife hereby represents and warrants that she has not incurred any debts, obligations, or liabilities for which the husband is now, or may be or hereafter become, liable or responsible, other than those debts and liabilities about which the husband now has knowledge. If, under any circumstances, notwithstanding this agreement, said Second Party shall ever be called upon or obligated to pay any of such debts, obligations, liabilities or special charges incurred by First Party, other than those which Second Party now knows about, then, First Party hereby agrees that she will immediately, after receiving notice from Second Party to that effect, pay and reimburse Second Party for said sum or sums so spent by Second Party to pay obligations incurred by First Party; and if First Party

fails to reimburse Second Party as herein agreed, Second Party may deduct said sums from any remaining amounts due First Party hereunder from Second Party.

“Third: That any and all property acquired by either of the parties hereto from and after the date hereof, shall be the sole and separate property of the one so acquiring same, and each of said parties hereby respectively grants to the other all such future acquisitions of newly acquired property or property distributed hereunder as the sole and separate property of the one so acquiring the same.

“Fourth: That each of said parties shall have an immediate right to dispose of or bequeath by Will his or her respective interests in and to any and all property belonging to him or her from and after the date hereof, and that said right shall extend to all of the aforementioned future acquisitions of property as well as to all property set over to either of the parties hereto under this agreement.

“Fifth: That the said parties hereto each hereby waive any and all rights to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession or otherwise, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other and hereby release and waive all right to inherit under any Will of the other and each of the said parties hereby waive

any and all right of homestead in the real property of the other, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance, by way of inheritance or otherwise, and from the date of this agreement to the end of the world said waiver of the other in the estate of the other shall from the date of this agreement be effective and they shall have all the rights of single persons and maintain the same relations of such toward each other.

“Sixth: That the wife does and shall accept the provisions herein made for her in full satisfaction of her right to the community property of the respective parties hereto; and the wife hereby covenants and agrees so long as the husband shall duly keep and perform the covenants, agreements, and conditions to be kept and performed by him hereunder, she will not at any time hereafter contract any debts, charge, or liability whatsoever, for which the husband or his property or his estate shall or may be or become liable or answerable and the wife hereby covenants and agrees that she will at all times hereafter keep the husband free and harmless from any and all debts or liabilities which may hereafter be incurred by her.

“Seventh: That it shall be lawful for the wife at all times hereafter to live separate and apart from the husband and free from his marital control and authority, as if she were sole and unmarried, and free from any control, restraint, or interference, direct or indirect by the husband; and it shall be

lawful for the husband, at all times hereafter, to live separate and apart from the wife, at such place or places as he may from time to time choose or deem fit.

“Eighth: That neither of the parties shall molest or annoy the other, or compel or endeavor to compel the other to cohabit or to dwell with him or her, as the case may be, by any legal or other proceedings, for restoration of conjugal rights or otherwise. Neither party hereto shall against the wish and desire of the other call upon or visit the other.

“Ninth: That the parties shall, at any time or times hereafter, make, execute, and deliver any and all such further or other instruments, papers, or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions, and agreements hereof; and any other community property of the parties hereto (other than that herein already specifically mentioned) which is hereafter discovered or which is presently in the possession of either party shall be equally divided by and between the parties hereto in accordance with the terms hereof, save and except it is agreed by the parties hereto that each will hand to the other any personal belongings of the other which are now in the possession of either party hereto.

“Tenth: That each party hereto hereby agrees in consideration of the mutual covenants herein made to pay without demand upon the other there-

for any and all attorney fees and/or Court costs incurred by him or her in any divorce or separation action or action for modification thereof, now pending or hereinafter instituted by him or her.

“Eleventh: That this agreement is not and is not to be construed to be an agreement for divorce, nor founded upon consideration of either party withdrawing from, or initiating, or abandoning or doing anything to facilitate the procuring of a divorce by either party hereto.

“Twelfth: That said parties are now living separate and apart, and if, for any cause, said parties shall cease to live separate and apart, the provisions and conditions of this agreement as to the property rights of the parties hereto shall not thereby be in anywise suspended, changed, modified, or altered, but the same shall remain in all respects in full force and effect, unless changed or modified by subsequent written agreement entered into between the parties hereto.

“Thirteenth: That it is mutually understood and agreed by the parties hereto that neither of the parties hereto shall hereafter be liable for the support, care, or maintenance of the other in whole or in part, and that each of the parties hereto shall hereafter provide and pay for his, or her, own care, maintenance and support. The parties hereto mutually agree that they will not, and that neither of them will, at any time, claim, apply for, ask or receive as against the other any order or judgment of

any Court for alimony, support, maintenance, costs or counsel fees, and that if, perchance, any Court shall ever grant or award unto either party any sums of money as and for either temporary or permanent support or maintenance and/or attorney's fees and/or Court costs, then and immediately thereupon that party who so received such award shall immediately execute and deliver over unto the other party a formal written waiver and disclaimer to any such sums of money for any such purpose or purposes, and said waiver or disclaimer may be filed in the then pending action between the parties hereto and used as a bar for the payment of any such sums of money for any such purpose or purposes.

“Fourteenth: That each party hereto expressly agrees and states that this agreement contains all of the terms, covenants and conditions agreed upon by the parties hereto and that there are no other or further promises or conditions or terms or covenants made by either party hereto as an inducement to the other to enter into this agreement.

“Fifteenth: That Second Party shall promptly pay the 1950 United States and State of California income taxes of these parties in regard to the income received from said property and Second Party shall take the community or marital deduction allowed by the United States and State of California when computing said taxes.

“Sixteenth: That each party to this agreement hereby solemnly and specifically avers that the

aforegoing agreement has been read, discussed, and agreed to by each of them, and each of said parties avers that he or she has received independent and separate advice in regard thereto, and that each party understands all of the provisions hereof, and that this agreement sets forth all of the community property of the parties hereto as fully and completely as each of them is now able to recall, and this agreement has been entered into without undue influence or fraud or coercion or misrepresentation or for any cause except as herein specified.

“In Witness Whereof, the parties hereto have hereunto, in duplicate, set their hands the day and year first above written.

/s/ IDRIS M. HOLCOMB,

Also Known as I. M. Holcomb, First Party.

/s/ WILLIAM F. HOLCOMB,

Also Known as W. F. Holcomb, Second Party.

“There will be an additional payment by Dr. W. F. Holcomb to Mrs. Idris M. Holcomb of \$25,000 (twenty-five thousand dollars) when the above agreement is fulfilled.

/s/ W. F. HOLCOMB.”

“State of California

“County of Alameda—ss.

“On this 28th day of June, 1950, before me, the undersigned, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and qualified, personally appeared Idris M. Holcomb, personally known to me to be the person described in and the person whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

“In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the said County of Alameda the day and year in this certificate first above written.

[Seal] /s/ GEO. L. HEWITT,

Notary Public in and for the County of Alameda,
State of California.”

“State of California

“County of Alameda—ss.

“On this 28th day of June, 1950, before me, the undersigned, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and qualified, personally appeared William F. Holcomb, personally known to me to be the person described in and the person whose name is subscribed to the within instru-

ment, and he acknowledged to me that he executed the same.

“In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the said County of Alameda the day and year in this certificate first above written.

[Seal] /s/ GEO. L. HEWITT,
Notary Public in and for the County of Alameda,
State of California.”

All of the foregoing constitutes the property settlement agreement entered into between the parties, but for the purpose of convenience that portion thereof following the signatures of the parties and relating to the payment by defendant to plaintiff of the additional sum of \$25,000.000 will hereinafter be referred to as the “addenda.”

VI.

At the time of the execution of said agreement no confidential relationship existed between the parties hereto and plaintiff was not subject or susceptible to the influence or domination of defendant.

VII.

Prior to and at the time of the execution of said agreement defendant did not make to plaintiff any false or fraudulent representation, nor did he make any promises other than as set forth in said agreement and the addenda, which said promises he intended to perform, nor did he exercise or use any

fraud, duress, threat, intimidation, menace or undue influence of any kind whatsoever upon plaintiff for the purpose of inducing her to enter into said agreement or at all. Defendant made no statements at or prior to the time of the execution of said agreement to plaintiff with an intent to deceive or mislead plaintiff. Plaintiff was in no way deceived or misled by defendant, nor did she rely upon any statements made by defendant to her at the time of or prior to the execution of said agreement.

VII.

In executing and entering into said property settlement agreement plaintiff was not acting under duress, menace, fear, threat, intimidation or compulsion of any kind whatsoever, nor as a result of any fraud or deception practiced upon her by defendant or with his connivance. Plaintiff was capable of entering into said agreement and her consent thereto was free and voluntary.

IX.

Plaintiff had full knowledge of the community property of the parties and was familiar with the nature and extent of same and of each and all of the particular items comprising the community property of the parties and the amount and value thereof, as well as the separate property of each and of the earnings and income of defendant.

X.

Prior to the execution of said agreement, plaintiff had submitted same to an attorney of her own

choosing, and prior to the signing thereof she had the advice of said attorney and the advice of an independent business advisor of her own choosing.

XI.

That for the purpose of dividing the community property, the plaintiff and defendant fixed the values of certain articles and parcels of said community property and agreed to said values for the purpose of such division pursuant to the terms of said property settlement agreement. Plaintiff and defendant further agreed that certain of the articles and parcels of said community property were to be taken by the plaintiff at the values so fixed and agreed upon, and that certain other articles and parcels were to be taken by the defendant at the values so fixed and agreed upon, all as set forth in said property settlement agreement hereinabove set forth. The remainder of said community property where values were not so fixed and agreed upon was to be taken at the cash value in the case of bank deposits, savings deposits and building and loan deposits, and at market value as of the date of said agreement as to articles other than cash. All of said community property of plaintiff and defendant was thereupon to be equally divided so that after giving credit to each for the values fixed and agreed upon for the specific articles and parcels to be taken by each there would be an equal division of said property on a dollar value basis. Upon such division the defendant agreed by the terms of the addenda to pay to the plaintiff in cash above and

beyond the share of the community property which by the agreement she was to receive, the further and additional sum of \$25,000.00. That the agreement on the part of the defendant to pay to plaintiff the additional sum of \$25,000.00 was made by him at the express instigation and request of plaintiff.

Plaintiff and defendant in fixing and agreeing to the values of certain of the articles and parcels of said community property did so voluntarily, free from fraud, coercion or misrepresentation and with full knowledge of the values thereof. The agreement of the parties in relation to the values so fixed by them is binding upon each of them.

XII.

Pursuant to the terms and provisions of said property settlement agreement, together with the addenda thereto appended, plaintiff received as and for her separate property the major portion of the community property of the parties. Said agreement is fair, just and equitable in all respects.

XIII.

There is no community property of the parties hereto of which the court may make division by reason of the fact that pursuant to the terms of said property settlement agreement the said parties agreed to the division of all of their community property.

XIV.

Defendant in open court waived any and all right to recover from plaintiff pursuant to the provisions of paragraph Thirteenth of said property settlement agreement any sums of money heretofore paid by him to plaintiff under and pursuant to that certain order entitled, "Order for Payment of Attorney's Fees, Court Costs, Alimony Pendente Lite, and Restraining Order," heretofore given and made by this court in the above-entitled proceeding, which said order is dated October 24, 1950, and signed the 26th day of October, 1950.

XV.

There was no collusion or connivance between the parties nor any understanding promotive of divorce in respect to the institution of this action.

Conclusions of Law

By reason of the foregoing findings of fact, the court makes the following conclusions of law:

I.

Plaintiff is entitled to an interlocutory judgment and decree of divorce on the ground of defendant's extreme cruelty.

II.

The property settlement agreement dated June 28, 1950, between plaintiff and defendant is valid and is binding on the parties hereto and should be approved.

III.

That each party hereto pay his and her own costs.

Let judgment be entered accordingly.

Done in open Court this 13th day of August, 1951.

CECIL MOSBACHER,

Judge of said Superior Court.

Exhibit 2

[Title of Superior Court and Cause.]

No. 229369

INTERLOCUTORY JUDGMENT AND DE-
CREE OF DIVORCE AND JUDGMENT
AFFIRMING PROPERTY SETTLEMENT
AGREEMENT

The above entitled cause came on regularly for trial on the 17th day of April, 1951, before the above-entitled Court, Department No. 11 thereof, Honorable Cecil Mosbacher, Judge, presiding, sitting without a jury, plaintiff appearing by her attorneys, Myron Harris, Esq., and R. J. Darter, Esq., and defendant appearing by his attorneys, Messrs., Rickson, Freeman & Johnson and Messrs. Bronson, Bronson & McKinnon; and the trial of said action proceeded on said day and succeeding days upon the issues presented by the complaint and supplemental complaint and the answers thereto, defendant's cross-complaint having been dismissed in open court; and evidence, oral and documentary, having been introduced by and on behalf of the

respective parties and the evidence being closed, the cause was submitted to the Court for consideration and decision on the 25th day of April, 1951.

And now on this 13th day of August, 1951, after due deliberation thereon, the Court has made and entered its Findings of Fact and Conclusions of Law.

Wherefore, by reason of the law and by the findings aforesaid, it is hereby Ordered, Adjudged and Decreed that a divorce should be granted to plaintiff from defendant and said plaintiff is entitled to a divorce from said defendant on the ground of defendant's extreme cruelty.

It is further Ordered, Adjudged and Decreed that the property settlement agreement dated June 28, 1950, between plaintiff and defendant is valid and is binding on the parties, and it is hereby ratified, confirmed and approved.

It is further Ordered, Adjudged and Decreed that each party hereto shall pay his and her own costs of suit incurred herein.

Done in open court this 13th day of August, 1951.

/s/ CECIL MOSBACHER,

Judge of said Superior Court.

Exhibit 3

In the Superior Court of the State of California,
in and for the County of Alameda
No. 229369

IDRIA M. HOLCOMB,

Plaintiff,

vs.

WILLIAM F. HOLCOMB,

Defendant.

FINAL JUDGMENT OF DIVORCE

The motion of the defendant for final judgment came on for hearing on this 18th day of August, 1952, upon all the files, papers, proceedings and records in the above-entitled action, from which it appears, and the Court finds, that an interlocutory Judgment of divorce was, on the thirteenth day of August, 1951, entered in said cause in Judgment Book 336, at page 248; that the motion for a new trial was denied and the appeal taken by plaintiff has been dismissed.

Wherefore it is hereby Ordered, Adjudged and Decreed that a divorce be, and it hereby is, granted and that the marriage between the above-named plaintiff and defendant be, and the same is, hereby dissolved, and the said parties are restored to the status of single persons.

Done in open Court this 18th day of August, 1952.

/s/ S. VICTOR WAGLER,

Judge of the Superior Court.

[Endorsed]: Filed Aug. 18, 1952, Superior Court.

[Endorsed]: Filed July 6, 1955, U.S.D.C.

[Title of District Court and Cause.]

MEMORANDUM

Murphy, D. J.

This is an action against the United States of America for the recovery of an alleged overpayment of federal income taxes in the amount of \$8,293.70, plus interest. The sole issue involved is whether, under the facts of the case, plaintiffs were entitled to file a joint return for the calendar year 1951 pursuant to the provisions of Section 51 of the Internal Revenue Code of 1939.

The stipulated facts are: the plaintiffs were married on December 1, 1923, and lived together as man and wife until approximately June 28, 1950. On or about the latter date the taxpayers separated by mutual consent and executed a property settlement agreement, which agreement made no provision for alimony or support payments temporary or otherwise. On or about August 13, 1951, Idris M. Holcomb was awarded an interlocutory decree of divorce, incorporating the above mentioned property settlement, by the Superior Court of the State of California, which decree became final on August 18, 1952. Plaintiffs filed separate returns for the calendar year 1951. On June 23, 1954, plaintiffs filed a joint return for 1951 and a claim for a refund of \$8,293.70, which was denied.

The determination of this case rests upon the interpretation of Sec. 51(b) 5(B) of the Internal Revenue Code of 1939 which states that "an individ-

ual who is legally separated from his spouse under a decree of divorce or separate maintenance shall not be considered as married" for the purposes of filing a joint return.

Admittedly the parties herein were not divorced in 1951. It is elementary that in California an interlocutory decree of divorce does not destroy the marriage. *Brown vs. Brown*, 170 Cal. 1, 147 Pac. 1168. Nor were they legally separated by what is commonly known as a decree of separate maintenance. It is pertinent in this connection to stress the fact that the property settlement did not provide for support payments and none in fact were ever received by the wife with the exception of \$4.840 worth of alimony pendente lite. Defendant however contends that the section in question also applies to persons who, while still legally married for other purposes, were "legally separated * * * under a decree of divorce." This contention has been made before and has been rejected. The identical issue was raised in *Marriner S. Eccles*, 19 T.C. 1049, aff'd 208 F.2d 796, 4 Cir., which held that since an interlocutory decree under Utah law did not dissolve the marriage, a joint return was proper. In the case of *William G. Ostler vs. Commissioner*, Docket No. 52185, T.C. Memo 1955-207, filed 7/25/55, the same result was reached on the same issue under California law.

In view of what seems to be the settled law in this area, the issue in this proceeding is decided in favor of the plaintiffs.

Pursuant to Rule 52(a) this memorandum shall be in lieu of Findings of Fact and Conclusions of law.

Judgment accordingly.

Dated, October 18, 1955.

/s/ THOMAS F. MURPHY,
United States District Judge.

[Endorsed]: Filed October 24, 1955.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 34443

WILLIAM F. HOLCOMB and IDRIS M. HOLCOMB,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause came on for trial before the Honorable Thos. F. Murphy, United States District Judge, without a jury, upon an agreed Statement of Facts, and the parties having appeared by their respective counsel, and the issues having been duly tried and the court having filed its opinion on the 24th day of

October, 1955, granting judgment as hereinafter provided; now therefore,

It is Hereby Ordered, Adjudged and Decreed that plaintiffs have and recover of defendant the sum of \$8,293.70 with interest as provided by section 6611 of the Internal Revenue Code of 1954.

Dated: Nov. 28, 1955.

/s/ THOMAS F. MURPHY,
United States District Judge.

Approved as to form:

LLOYD H. BURKE,
United States Attorney,
Attorneys for Defendant.

By /s/ LYNN J. GILLARD,
Asst. U.S.A.

Entered in Civil Docket Dec. 5, 1955.

[Endorsed]: Filed Dec. 2, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS

Notice is Herby Given that United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 5, 1955.

Dated: January 31, 1956.

LLOYD H. BURKE,

United States Attorney;

By /s/ LYNN J. GILLARD,

Assistant United States Attorney, Attorneys for
Defendant.

[Endorsed]: Filed January 31, 1956.

In the United States District Court for the North-
ern District of California, Southern Division

No. 34,443

WILLIAM F. HOLCOMB and IDRIS M. HOL-
COMB,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

Thursday, August 25, 1955

Appearances:

For the Plaintiff:

BRONSON, BRONSON & McKINNON, By
MAX WEINGARTEN, ESQ.

For the United States:

HON. LLOYD H. BURKE,

United States Attorney, by

LYNN GILLARD, ESQ.,

Assistant United States Attorney.

The Clerk: Holcomb vs. United States, on trial.

Mr. Gillard: Ready.

Mr. Weingarten: Ready.

The Clerk: Will counsel please announce their appearances?

Mr. Weingarten: Max Weingarten.

Mr. Gillard: Lynn Gillard of the U. S. Attorney's office, appearing for the government.

The Court: Proceed, Mr. Weingarten.

Mr. Weingarten: Your Honor, this is a suit for refund of taxes and should be rather quick, because the parties have agreed that this case should be tried on the basis of the facts that are admitted in the pleadings and as contained in the stipulation of facts filed with this court.

It is also stipulated that there is only issue involved, namely, whether under the facts of this case the plaintiffs were entitled to file a joint return for the calendar year of 1951 pursuant to the provisions of Section 51 of the 1949 Internal Revenue Code.

Section 51 of the Code provides that a husband and wife may file a single return, and subdivision (b) (5) then goes on to say that the status as husband and wife shall be determined as of the close of the year, and an individual who is legally separated

from his spouse under a decree of divorce of separate maintenance shall not be considered as [3*] married.

Plaintiffs were both residents of California in the year 1951, the year with which we are concerned.

On August 3, 1951, the wife was awarded an interlocutory decree of divorce which under California law does not become final for one year.

The sole issue is whether under these facts the plaintiffs were entitled to file a joint return for the year '51, the year in which the interlocutory decree was entered but before the final decree was entered.

There are several decisions squarely in point, both Tax Court decisions and two Circuit Court decisions.

The Court: Excuse me just a second. Are you reading from some brief that you have prepared or just notes?

Mr. Weingarten: Not a brief; just some summary notes.

The Court: Do you intend to give me a brief?

Mr. Weingarten: If your Honor wishes, yes, I would like to.

The Court: I am just wondering about the wisdom of it. If I can just take down what cases you are citing, you needn't read them.

Mr. Weingarten: All right.

The Court: There are some Tax Court decisions?

Mr. Weingarten: Yes. The Tax Court decision squarely in point is the Eccles case, Marriner S.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Eccles, 19 T.C., [4] 1049, affirmed by the Fourth Circuit, 208 Fed. 2d. 796 involving the very issue.

The Court: What state was that?

Mr. Weingarten: Utah.

The Court: Is there a similar statute there?

Mr. Weingarten: Yes.

The Court: Thank you.

Mr. Weingarten: The next case is Humphreys Evans, 19 T.C. 1102, involving a case in Colorado, affirmed by the Tenth Circuit, 211 Fed. (2) 378. And in researching the case, I find that exactly one month ago, on July 25, 1955, a Tax Court decision involving the same issue in California was also decided in favor of the plaintiff. The case involved is William G. Ostler, Tax Memorandum 1955, 207. I have a photostatic copy of the decision because it might not be published yet.

The only other thing I wanted to point out, if your Honor would like a brief on these points, is that the tax Court and the Circuit Court decisions hold that whether a person is married or not depends upon his status according to the state law.

The Court: Yes.

Mr. Weingarten: And I have cases to the effect that in California a person is not divorced after rendering of the interlocutory decree, and also that the interlocutory [5] decree is not identical with a separate maintenance decree. And if your Honor wants, I will gladly prepare a brief on that point.

The Court: Just give me the California decisions.

Mr. Weingarten: 16 Cal. Juris. 2d. 412. That is a summary of California law.

The Court: I would rather have the citations.

Mr. Weingarten: That is the citation, 16 Cal. Juris. 2d. page 412.

The Court: Is that the citation of a case?

Mr. Weingarten: No; it is like American Juris. of the country; it is a summary of the California law. It cites many cases to the effect that it is elementary that an interlocutory decree of divorce does not dissolve the marriage and that the parties remain married. Similarly Code Section 61 of California provides that a marriage within one year is void.

The Court: Just a minute. Marriage within one year is void?

Mr. Weingarten: Yes.

The Court: You mean it is a prohibition against remarriage?

Mr. Weingarten: That's right; within one year after the interlocutory decree.

The Court: That wouldn't necessarily make it not [6] final in the sense that the parties are not separated.

Mr. Weingarten: Well, if the divorce were to be final, then the parties could remarry.

The Court: Well, let us suppose that the California law says that it shall be a felony if they ever remarry again.

Mr. Weingarten: No, because they stayed here——

The Court: Let us suppose if they ever remarry again it will be a felony.

Mr. Weingarten: Well, I don't know what the

result would be then, but the reason is, and it states so here, that the interlocutory decree of divorce does not dissolve the marriage.

The Court: Yes, I appreciate that.

Mr. Weingarten: All right.

The Court: But you have no California cases?

Mr. Weingarten: Oh, yes. I think I would prefer, if your Honor likes, within one week to file a brief on that point.

The Court: You couldn't do it quicker than that?

Mr. Weingarten: Oh, yes, I could do it quicker, your Honor.

The Court: Because my commission expires on the 31st.

Mr. Weingarten: What time would be convenient?

The Court: When I hear the government, if you can agree on a date, I would like to get it. [7]

Mr. Weingarten: I could do it sooner, your Honor.

The Court: Let me hear the government then.

Mr. Gillard: As counsel has stated, this problem has been passed upon by the Tax Court.

The only case which I believe is of particular interest to the Court is the Eccles cited by counsel, and that passes, presumably, directly upon the issue here. The Ostler case cited by Mr. Weingarten follows the Eccles case without further discussion, and in the Evans case a little different point was involved.

I am not in disagreement with counsel that, under the California law, the interlocutory decree does

not dissolve the marriage. I don't think that there is any particular question about that, although as your Honor indicated in his questions, the interlocutory decree itself is final and *res judicata* after the appropriate time for appeal has passed. The proceeding cannot be dismissed on the motion of one party without the consent of the other or any such thing as that; it is a final decree *res judicata* of the issues determined in the interlocutory decree, including property settlement rights.

But to me the interesting part about the *Eccles* case is that when your Honor reads that case you will notice that the Court does not discuss the issue of whether or not pursuant to the interlocutory decree the parties are [8] legally separated. The statutory language that we are dealing with in this case under Section 51 of the Internal Revenue Code is that it has been alleged, for the purpose of filing a joint return—shall not include persons legally separated.

The Court: I think it says legally separated by decree.

Mr. Gillard: Legally separated by a decree of divorce or a decree of separate maintenance. The Court in the *Eccles* case was determining as far as the decree of divorce was concerned. The issue was solely whether or not the marriage was dissolved, not whether they were legally separated. I think the two things are distinguishable.

The Court: How did the issue get into the Tax Court? On a deficiency because they filed joint returns?

Mr. Gillard: In the Eccles case there was a deficiency, yes; in this case because it was paid and a refund is sought.

The Court: Wouldn't it be substantially the same question presented?

Mr. Gillard: The same question is presented in the Eccles case as is presented in this case. I am pointing out to the Court that I don't believe the Eccles case met the issue.

The Court: I see. [9]

Mr. Gillard: And I will call your attention in that connection to a California case, *Stauter vs. Carithers*, 185 Cal. 160, in which the issue to be decided was whether or not persons were legally separated under an interlocutory decree of divorce.

The Court: What do you say would be the situation of a wife who was the defendant in a California case in which an interlocutory decree had been entered against her and within the time period, before the expiration of the six months the husband died intestate. Would she inherit his estate?

Mr. Gillard: The marriage is undissolved.

The Court: She would get the regular wife's share?

Mr. Gillard: That is correct.

The Court: That would have some relevancy, it seems to me, as to whether or not they were divorced or separated.

Mr. Gillard: That is correct, except we are trying to find out, I think, in this case whether or not Congress was trying to prevent filing joint returns only by persons who were finally divorced or by

virtue of some lesser status, and the language used in Section 51 is "persons lawfully separated."

The Court: Have you any citations dealing with the historical background of that section of the Code, the legislative history? [10]

Mr. Gillard: There is a reference to it in the *Eccles* case.

The Court: To the legislative history?

Mr. Gillard: Yes, your Honor.

The Court: What do they say Congress' intention was?

Mr. Gillard: There are two different situations. The second rule with reference to this situation we are dealing with, they say this:

"This rule is in substance the same as that provided in existing law. The second rule is that an individual legally separated (although not absolutely divorced) from his spouse under a decree of divorce or separate maintenance shall not be considered as married."

so there the Congressional intent was likewise apparently not for the purpose of determining whether there was an absolute decree of divorce or whether or not the persons were lawfully separated, maintaining two separate households. The purpose was to prevent the filing of joint returns where two separate households were maintained in a situation where they were lawfully separated and there is some sort of a court decree.

The Court: Do the facts here state in substance

that the parties were in fact living apart after the decree? I assume they were. [11]

Mr. Gillard: Does the stipulation cover that, counsel?

Mr. Weingarten: Yes.

Mr. Gillard: This California case I cited, *Stauter vs. Carithers*, is a case which arose under Section 223 of the Civil Code which prevents a woman who was not lawfully separated from her husband from adopting children without the consent of the husband. In that case there was an interlocutory decree of divorce and the California court decided that she was a woman lawfully separated from her husband pursuant to this interlocutory decree—the same language that is used in Section 51 here.

The Court: I would assume that follows. I would assume that as soon as they started living together the interlocutory decree become nugatory. Wouldn't the divorce then become not final? Wouldn't they be condoning whatever——

Mr. Gillard: Oh, yes. I think the Court misunderstood me. If the parties go back together during that interlocutory year, neither party then is entitled to a final decree. The *Stauter* case dealt with a case in which the husband and wife were lawfully separated under an interlocutory decree, and during that period of time one of the parties attempted to adopt a child. And the court went on to say that although the divorce was not final at the time, nonetheless they were separated and lawfully separated by virtue of the interlocutory decree, and, as a matter [12] of fact, under the provisions of it, it

couldn't be effective unless they remained separated. I think that case, together with the fact that the Eccles case did not come to issue on that point serves to indicate, at least to my mind, that the Tax Court plus the Congressional intent as shown in the language of the Eccles case above cited, didn't meet the issue that actually Congress intended to raise in this situation.

The Court: Can we agree as to a date when you can both exchange and give me briefs? I would assume that the briefs can be rather brief. Would Tuesday be too much of a rush for both of you to exchange and give them to me?

Mr. Gillard: Simultaneous briefs?

The Court: I don't want reply briefs at all. Would that be agreeable?

Mr. Weingarten: Yes.

Mr. Gillard: Yes.

Mr. Weingarten: Your Honor, could I reply?

The Court: Oh, yes indeed. Are you finished?

Mr. Gillard: Yes, your Honor.

Mr. Weingarten: I would only like to take issue with counsel's statement that the Eccles case didn't meet the point. The Eccles case met the point squarely. The government made two arguments. One was that the interlocutory decree was a decree of divorce and seemingly conceded the [13] point that the decree was not a final decree. The next argument was if it wasn't a final decree it was a decree of separate maintenance and the court met this issue squarely. And I am reading now from the brief:

“Were they then legally separated under a decree of separate maintenance? Like the term ‘decree of divorce,’ the term ‘decree of maintenance’ is a term of art and carries a definitive legal meaning.

“Fundamental differences in the nature of the action brought and the relief requested exist in suits for divorce in which an interlocutory decree may be entered and suits for separate maintenance, and on the face of it the decree here involved looked towards a final divorce, not a decree of separate maintenance. The law of Utah, which is controlling in this proceeding, illustrates some of the distinctions.”

and then they cite, for instance, the venue provisions are different in divorce and separate maintenance. They also said:

“No provision was made in the decree here involved for support or separate maintenance of any kind * * *”

now, exactly the same thing applies in California. For instance, for a divorce proceeding it is necessary that the parties be domiciled in California. For separate maintenance [14] it is not necessary and even a nonresident may bring an action for separate maintenance.

The purpose of a suit for separate maintenance in California and as used all over the country is to force the husband to make periodic payments for the wife. That is a suit for separate maintenance.

In this case, the same as in the Eccles case, the wife prevailed; but, as your Honor will see, there is no provision made at all for any payment, either periodic payments of alimony or for separate maintenance for the wife, and therefore it couldn't possibly be a decree for separate maintenance.

The Court: Can she under California law apply at the end of the decree for that?

Mr. Weingarten: Oh, yes, she can apply for separate maintenance even without asking for divorce.

The Court: No, before there is an interlocutory decree of divorce——

Mr. Weingarten: No.

The Court: And no mention made for support?

Mr. Weingarten: No, that is final.

The Court: She cannot apply?

Mr. Weingarten: Not any more if the interlocutory is silent. I have this here. There is another distinction. The trial court has jurisdiction to modify a separate maintenance decree by granting the wife additional support even [15] after the decree has become final; but if an interlocutory decree does not award any alimony, she is precluded forever.

The Court: Are you reading that?

Mr. Weingarten: Yes, I am sure of it, but I will cite your Honor authorities for that effect.

I would also like to point out, your Honor, that the Evans case dealt with this issue also, exactly, and here is the conclusion they reached.

The Tenth Circuit indicated that the terms "separate maintenance" and "interlocutory decree" are not synonymous and that Congress was fully fa-

miliar with the legalistic meaning of these terms and that if Congress had meant to include interlocutory decree, it certainly would have been a simple matter for it to do so. And then the Court concluded that the interlocutory decree is not identical with a decree of separate maintenance.

I would also like to point out to your Honor that I have studied the Senate Committee reports to the 1954 Revenue Act and they deal in many situations with Circuit Court decisions decided as late as May 1954 where the courts decided a certain issue which Congress decided to change. These cases were decided in March, '53. So Congress and the government were fully familiar with the interpretations given to this section by the Court, yet they didn't try to change it, and it seems to me that—— [16]

The Court: Is it in the 1954 Code, too?

Mr. Weingarten: Yes, exactly the same words.

The Court: Identical?

Mr. Weingarten: Identical.

So it seems to me if the interpretation would have been inconsistent with Congressional intent, they could easily have modified it, and yet it wasn't done.

The Court: Do you have that or will you have that legislative history?

Mr. Weingarten: I will, yes.

The Court: All right, gentlemen. I will reserve decision unless there is something more you want to add.

Mr. Weingarten: That is Tuesday?

The Court: Yes, Tuesday, August 30th.

The Clerk: August 30th for submission.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 17 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed March 9th, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint, with exhibits.

Answer of Defendant.

Stipulation of Facts with exhibits.

Memorandum Opinion of Court.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Order Extending Time to Docket Record on Appeal.

Reporter's Transcript of Proceedings.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 13th day of March, 1956.

[Seal] C.W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15064. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. William F. Holcomb and Idris M. Holcomb, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 13th, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15064

WILLIAM F. HOLCOMB and IDRIS M. HOLCOMB,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

APPELLANT'S STATEMENT OF POINTS
TO BE RELIED UPON ON APPEAL

Comes now the United States of America, appellant in the above-captioned proceeding by and through its attorney of record, Lloyd H. Burke, United States Attorney for the Northern District of California, and hereby states that it intends to rely upon the following points in this appeal:

The district court erred:

1. In deciding the issue in this proceeding in favor of the plaintiffs;
2. In failing and refusing to recognize and uphold the propriety of the determination by the Commissioner of Internal Revenue that the plaintiffs were not entitled to file a joint income tax return for the year ended December 31, 1951;
3. In holding and deciding that the plaintiffs were husband and wife on December 31, 1951, and

were entitled to file a joint income tax return for the taxable year ended on that date;

4. In failing and refusing to hold and decide that the taxpayers, who were legally separated (although not absolutely divorced) under an interlocutory decree of divorce on August 13, 1951, could not, within the meaning of Sections 25(b) (2)(b) and 51(b) (5) of the Internal Revenue Code of 1939, file a joint federal income tax return for the taxable year ended December 31, 1951;

5. In that its opinion and decision are not supported by, but are contrary to, the facts as stipulated by the parties; and

6. That its opinion and decision are contrary to the law and the regulations promulgated thereunder by the Commissioner of Internal Revenue.

/s/ LLOYD H. BURKE,

United States Attorney,

/s/ LYNN J. GILLARD,

Assistant United States
Attorney.

[Endorsed]: Filed March 6th, 1956.

No. 15,064

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM F. HOLCOMB and

IDRIS M. HOLCOMB,

Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE APPELLANT.

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FILE

MAY - 4 1956

PAUL P. O'BRIEN, CL

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No. 15,064

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM F. HOLCOMB and

IDRIS M. HOLCOMB,

Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE APPELLANT.

OPINION BELOW.

The opinion of the District Court (R. 50-52) is reported at 137 F. Supp. 619.

JURISDICTION.

This appeal involves a claim for refund of income taxes, alleged to have been erroneously assessed and collected for the year 1951. The suit, in which the United States has been named as defendant, was in-

stituted in the United States District Court for the Northern District of California. Jurisdiction was conferred on that Court by 28 U.S.C., Section 1346. (R. 3-6.)

The taxpayers, William F. Holcomb and Idris M. Holcomb, filed separate income tax returns for the year 1951. The taxpayer, William F. Holcomb, reported in his separate return a net income of \$53,887.39, and paid an income tax of \$29,661.54. Subsequently, upon the audit of his return, his net income was determined to be \$68,880.59, and an additional tax of \$11,493.32 was assessed. On or about May 16, 1954, he paid this additional tax together with interest. The taxpayer, Idris M. Holcomb, reported in her separate return a net income of \$1,553.31, and paid an income tax of \$72.08, making a total of \$41,226.94 in income taxes paid by both taxpayers for the year 1951. (R. 23-24.)

On June 23, 1954, within the period prescribed by Section 51(g)(3) of the Internal Revenue Code of 1939, the taxpayers filed a joint income tax return for the year 1951, showing a total income tax liability of \$32,933.24. Concurrently with the filing of this joint return, within the period allowed by Section 322 of the Internal Revenue Code of 1939, the taxpayers also filed with the Director of Internal Revenue, San Francisco, California, a claim for refund of \$8,293.70, with interest. (R. 7-10, 24-25.)

Not having received notice of a decision on their refund claim within six months after it had been filed, as prescribed by Section 6532(a)(1) of the Internal

Revenue Code of 1954,¹ the taxpayers on February 7, 1955, instituted this suit in the District Court. (R. 5, 19, 20.) The District Court's judgment in favor of the taxpayers, in the amount of \$8,293.70, with interest, was entered on December 5, 1955. (R. 52-53.) A notice of appeal was timely filed on behalf of the United States on January 31, 1956. (R. 53-54.) Jurisdiction to hear and determine this appeal is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether under Section 51 of the Internal Revenue Code of 1939, the taxpayers were entitled to file a joint income tax return for the year 1951, notwithstanding the fact that as of the close of that year they were legally separated under an interlocutory decree of divorce.

STATUTE INVOLVED.

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

* * * * *

(b) [As amended by Sec. 303, Revenue Act of 1948, c. 168, 62 Stat. 110] *Husband and wife*.—

(1) *In general*.—A husband and wife may make a single return jointly. Such a return

¹By ordinary mail, the taxpayers did receive a letter from the District Director, dated January 10, 1955, notifying them of the disallowance of their refund claim. (R. 16.)

may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * * *

(5) *Determination of status.*—For the purposes of this section—

(A) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined—

(i) if both have the same taxable year—as of the close of such year; and

(ii) if one dies before the close of the taxable year of the other—as of the time of such death; and

(B) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

* * * * *

(26 U.S.C. 1952 ed., Sec. 51.)

STATEMENT.

The facts as stipulated (R. 21-49) and found by the District Court (R. 50) may be summarized as follows:

The taxpayers were married on December 1, 1923, and lived together as man and wife until June 28, 1950. On or about the latter date, the taxpayers separated by mutual consent and executed a property settlement agreement. On or about August 13, 1951,

the Superior Court of the State of California awarded Idris M. Holcomb an interlocutory decree of divorce and approved the property settlement agreement. This decree became final on or about August 18, 1952. (R. 21-23, 50.)

The taxpayers filed separate income tax returns and paid income taxes totaling \$41,226.94 for the year 1951. On June 23, 1954, they filed a joint income tax return for 1951, showing a total income tax liability of \$32,933.24. On the same date they filed a claim for refund of the difference between this amount and the amount of income taxes paid, or \$8,293.70, together with interest. Their claim for refund not having been allowed, this suit for refund followed. (R. 23-25, 50.)

Rejecting the Government's contention that the taxpayers were not entitled to file a joint return for the year 1951, because as of the close of that year they were legally separated pursuant to an interlocutory decree of divorce, and relying upon *Eccles v. Commissioner*, 19 T.C. 1049, affirmed *per curiam*, 208 F. 2d 796 (C.A. 4th), and *Ostler v. Commissioner*, decided July 25, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,207), the District Court entered judgment in favor of the taxpayers. (R. 51-53.)

STATEMENT OF POINT TO BE URGED.

The District Court erred in holding that the taxpayers, who as of December 31, 1951, were legally separated under an interlocutory decree of divorce,

were entitled to file a joint income tax return for the year 1951.

SUMMARY OF ARGUMENT.

The issue in the instant case and the issue in *Commissioner v. Ostler*, No. 14,984, now pending before this Court, are identical and the basic facts in the two cases are essentially the same. For reasons more fully developed in our brief in the *Ostler* case, the judgment of the District Court should be reversed.

ARGUMENT.

THIS CASE IS INDISTINGUISHABLE FROM COMMISSIONER v. OSTLER, PENDING IN THIS COURT, AND FOR THE REASONS THERE DEVELOPED THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED.

The sole issue in the case at bar and the sole issue in *Commissioner v. Ostler*, No. 14,984, now pending before this Court on Commissioner's appeal, are identical—namely, whether under Section 51 of the Internal Revenue Code of 1939, *supra*, taxpayers are entitled to file a joint income tax return for a year at the close of which they are legally separated under an interlocutory decree of divorce. Noting that the issue in this case is the same as in *Ostler*,² the District

²The District Court further pointed out that a like issue was involved in *Eccles v. Commissioner*, 19 T.C. 1049, affirmed *per curiam*, 208 F. 2d 796 (C.A. 4th). A similar issue was also presented in *Evans v. Commissioner*, 19 T.C. 1102, affirmed, 211 F. 2d 378 (C.A. 10th).

Court held that the Tax Court's decision in the *Ostler* case should be followed. (R. 51.) We have developed in our brief in *Ostler* why the Tax Court's decision is incorrect and should be reversed.

The decision in *Ostler* and similar cases, as more fully demonstrated in our brief in *Ostler*, rests upon a fallacious premise—namely, that the privilege of filing a joint return afforded by Section 51 of the Internal Revenue Code of 1939 is not forfeited by spouses legally separated under an interlocutory decree of divorce so long as their marriage status has not been absolutely terminated. The statute, however, provides for forfeiture of this privilege by spouses "legally separated" under a decree of divorce or of separate maintenance. There is no provision that the spouses must be legally separated under any particular type of decree of divorce or that an interlocutory decree of divorce shall not be considered a decree of divorce. The legislative history of the statute confirms the conclusion that in restricting the privilege of filing joint returns Congress intended to cover situations in which spouses were not, as well as situations in which they were, absolutely divorced. A consistent and long standing administrative construction is in accord with such interpretation.

Accordingly, since the taxpayers in the case at bar were legally separated under an interlocutory decree of divorce at the close of the year 1951, they were not entitled to file a joint income tax return for that year.

CONCLUSION.

The judgment of the District Court is erroneous and should be reversed.

Respectfully submitted,

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May, 1956.

No. 15,064

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM F. HOLCOMB and

IDRIS M. HOLCOMB,

Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California,
Southern Division.

BRIEF FOR APPELLEES.

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No. 15,064

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	} <i>Appellant,</i>
vs.	
WILLIAM F. HOLCOMB and IDRIS M. HOLCOMB,		} Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California,
Southern Division.

BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

Appellant states on page 6 of its brief that the issue in the case at bar and in *Commissioner v. Ostler*, No. 14,984, is identical and that the basic facts are essentially the same in both cases. We have not been furnished with a transcript of the *Ostler* case and are not familiar with its facts, except as they appear from the decision of the Tax Court¹ and from the Government's brief in the *Ostler* case, a copy of which has

¹Tax Court Memorandum decision, 1955-207.

been furnished to us by appellant. Since appellant in its brief incorporates by reference the contents of its brief filed in the *Ostler* case, we will discuss the points raised by appellant in its briefs filed in both the *Ostler* case and the case at bar. (We are advised that respondent William G. Ostler is not represented by counsel.)

QUESTION PRESENTED.

On the last day of 1951 there was in effect an interlocutory decree of divorce between appellees, which had been entered on August 30, 1951 by the Superior Court of the State of California. The sole question involved is whether, under the circumstances, the appellees were entitled to file a joint return for the year 1951 pursuant to the provisions of Section 51 of the Internal Revenue Code of 1939.²

STATUTE AND REGULATIONS INVOLVED.

The statute and regulations involved are reproduced in Appendix A to this brief.³

²Appellant's statement of the question is objected to, since it *assumes* that appellees were "legally separated" by the interlocutory decree within the meaning of Section 51. In the *Ostler* brief it refers to Mrs. Ostler as taxpayer's "former wife". These are points for the court to consider and decide, since they bear on the issue involved. Appellant's assumption of these facts throughout its briefs results in an inaccurate or colored statement of the issue involved.

³All sections, unless otherwise stated, refer to the 1939 Revenue Code.

STATEMENT OF FACTS.

We have only one objection to appellant's rather sparse statement of the facts, all of which were stipulated. Appellant fails to state that even though the interlocutory decree was granted to appellee Idris M. Holcomb, the wife, it awarded to her "neither alimony nor support or maintenance, nor any payment whatsoever . . ." (Stipulated facts, Item 8, R-23.)

SUMMARY OF ARGUMENT.

On December 31, 1951, appellees were not, under California law, legally separated by either a decree of divorce or a decree of separate maintenance within the meaning of Section 51. An interlocutory decree of divorce is not a "decree of divorce" since that term, as used in Section 51 means a *final* decree of divorce. An interlocutory decree of divorce is not equivalent to a decree of separate maintenance, which is a term of well recognized legal content. A decree of separate maintenance is a decree which awards support money to the prevailing party. An interlocutory decree granted to the wife which makes no provision for her support cannot, in any event, be a decree of separate maintenance.

There are several cases squarely in point on the issue involved, all upholding appellees' view. We will show that under California law, which controls the marital status of appellees, the reasoning of these cases is equally applicable to the case at bar and that the judgment of the District Court should therefore be affirmed.

ARGUMENT.

I. LEGAL AUTHORITIES ON ISSUE INVOLVED.

The identical statutory language with which we are concerned is also found in Section 22(k) of the Internal Revenue Code of 1939 which provides in part that certain payments made by a husband to his wife who is "*legally separated from her husband under a decree of divorce or separate maintenance*"⁴ are taxable to the wife. The legislative history of Section 51 shows that "the rule with respect to the marital status of an individual legally separated from his spouse under a decree of divorce or of separate maintenance is derived from a corresponding provision in Section 22(k) of the Code, relating to the tax treatment of alimony and like payments" . . . and that "a uniform construction of all these provisions is intended". (S. Rept. No. 1013, 80th Cong. 2d Sess., 1948-1 C.B. 285, 324.)

The courts did give uniform construction to the language involved in all cases in which the interpretation of this language was involved, all upholding appellees' view. We will now discuss these cases:

Marriner S. Eccles, 19 T.C. 1049, affirmed, 208 F. 2d 796 (C.C.A. 4th).

The *Eccles* case involved the identical issue as the case at bar, namely whether a husband and wife who were separated by an interlocutory decree, which was not yet final, could file a joint return under Section 51. The case arose in Utah. The Tax Court, in holding for the taxpayer, reasoned in part as follows:

⁴Emphasis supplied unless otherwise indicated.

“It is plain that whether the petitioner here meets the basic test imposed by the language set forth above depends upon his marital status as determined by state law for the marital relation. Marriage, its existence and dissolution, is particularly within the province of the states. Since this is so, an examination of the decree here in question is essential to the proper decision of this case. The decree is seen at once to be an interlocutory decree. *Generally it is recognized that an interlocutory decree does not and can not terminate the matrimonial status of the parties.* The Restatement of Conflict of Laws states that after an interlocutory decree of divorce has been granted neither party ceases to be married until the lapse of the given time. However, we must look to the laws of the State of Utah to finally determine the marital effect of the decree entered here between Marriner S. and Maysie Y. Eccles.

. . .

“Under the laws of the State of Utah an interlocutory decree does not end the matrimonial status of the parties, nor destroy the economic and social incidents inherent in marriage.”

The court cited in support of its conclusion cases holding that in Utah after the entry of an interlocutory decree, and before it becomes final, the wife retained the right to inherit from the husband's estate, the right to secure letters of administration for the husband's estate, and that an attempted marriage to a third person during the interlocutory period is null and void. The court concluded that under Utah law the taxpayers despite the granting of an interlocutory decree remained husband and wife; and were not then

legally separated under a decree of divorce under Section 51 as the “decree of divorce” contemplated by that Section is a *final* decree.

The court next dealt with the Government’s argument that the interlocutory decree should have the same effect as a separation under a “decree of separate maintenance”. The court concluded that an interlocutory decree is not a decree of separate maintenance:

“Like the term ‘decree of divorce’, the term ‘decree of maintenance’ is a term of art and carries with a definitive legal meaning.

“Fundamental differences in the nature of the action brought and the relief requested exist in suits for divorce in which an interlocutory decree may be entered and suits for separate maintenance, and on the face of it the decree here involved looked towards a final divorce, not a decree of separate maintenance.

* * * * *

“Procedural differences also exist between the two actions. Venue for divorce action lies in the county where the wife resides, while venue for an action of separate maintenance may be either in the county where the wife resides or in any county in which the husband may be found. . . .

“No provision was made in the decree here involved for support or separate maintenance of any kind, . . . It would appear then that the parties were not legally separated under a decree of separate maintenance.”

The Tax Court held that the spouses who were legally separated under an interlocutory decree of

divorce, as of December 31, 1949, were for the purpose of Section 51 still husband and wife and thus entitled to file a joint return. The 4th Circuit Court affirmed the decision of the Tax Court in a one paragraph opinion which concludes:

“We think that the decision of the Tax Court was clearly correct for reasons adequately stated in its opinion.” (208 F. 2d 796.)

Alice Humphreys Evans, 19 T.C. 1102, affirmed, 211 F. 2d 378 (C.C.A. 10th).

The question involved the taxability under Section 22(k) of payments made by the husband to the wife during a period following an interlocutory decree but before the decree became final. The interpretation of the same language as contained in Section 51 was involved. The court concluded that while the case arose under a different section of the Code the basic question was decided by the *Eccles* case since under Colorado law, similar to that of Utah, the marital status of the spouses was not changed by the interlocutory decree. The wife was therefore not required to pay tax upon the temporary alimony.

The Commissioner again strenuously argued that the term “decree of separate maintenance” should be construed to include persons separated by an interlocutory decree. The 10th Circuit Court in holding against the Commissioner and in affirming the Tax Court, stated:

“Obviously, the terms ‘separate maintenance’ and ‘interlocutory decree’ as used in Colorado law are not synonymous . . . *Both of these terms have*

specific legalistic meanings, and if Congress had meant to include 'interlocutory decree' in Section 22(k), it certainly would have been a simple matter for it to do so. We agree with the Tax Court that an interlocutory decree under Colorado law is not 'separate maintenance' within the meaning of Section 22(k)."

William G. Ostler v. Commissioner, Tax Court Memo. 1955-207.

This decision involved the identical issue as in the case at bar, in that it not only dealt with the right of spouses to file a joint return after an interlocutory decree has been entered but before it has become final, but it also dealt with an interlocutory decree rendered in California. Plaintiff did not even appear since he was ill. The Tax Court rendered the decision in favor of the taxpayer from the bench, stating that no briefs would be required, since the case came squarely within the holding of the *Eccles* case and "*the fact that in the Eccles case the husband and wife were domiciled in the State of Utah, whereas here they are domiciled in the State of California makes no difference*". This decision is clearly correct, since, as we will show, the marital status of the plaintiffs after the interlocutory decree but before the entry of the final decree, is under California law identical as under Utah law.

II. STATUS OF PARTIES UNDER CALIFORNIA LAW.

Against the background of these cases we will now show that under California law which controls the marital status of appellees, an interlocutory decree

does not terminate the marriage relationship and that an interlocutory decree is not a decree of separate maintenance.

A. An Interlocutory Decree Does Not Terminate the Marriage Relationship and Is Not a Decree of Divorce.

Here are a few of the innumerable authorities in support of the principle hereinabove stated:

16 Cal. Juris., 2d 412:

“It is elementary that an interlocutory decree of divorce does not dissolve the marriage. The parties continue to be husband and wife until the entry of the final decree after the lapse of one year.”

In Re Dargies Estate, 162 Cal. 51, 112 P. 320:

“It is the final judgment that grants the divorce. The interlocutory decree does not have that effect . . . In the meantime the parties remain in the legal relation of husband and wife.”

Nelson v. Nelson, 7 Cal. 2d 449, 60 P. 2d 982:

“It is well settled, of course, that an interlocutory decree does not sever the marital bonds.”

Remley v. Remley, 49 Cal. App. 489, 193 P. 604:

“An interlocutory judgment in a divorce action is not a decree of divorce, nor does it dissolve the marriage, it is merely a declaration that one of the spouses is entitled to a divorce.”

Since the spouses remain husband and wife even after the interlocutory decree has been entered, it has been held that:

1. Upon the husband's death, after the interlocutory decree has been entered but prior to the entry of the final decree, the wife becomes the surviving widow; and where the will of the deceased provided for the division of his estate among his heirs, and the only other heir is the father of the deceased, one-half of the estate is properly distributed to the surviving widow. The above result was reached even though an interlocutory decree had been granted to the deceased husband on the ground of the wife's desertion. (*Estate of Fulton*, 23 Cal. App. 2d 563, 73 P. 2d 644; see also *Cheney v. S. F. Emp. Retirement System*, 7 Cal. 2d 565, 61 P. 2d 754.)

2. The spouse is not denied administration of the other spouse's estate merely because an interlocutory decree of divorce has been secured. (*Seiler Estate*, 164 Cal. 181, 128 P. 334; *Martin Estate*, 166 Cal. 399, 137 P. 2; *Walker Estate*, 169 Cal. 400, 146 P. 868.)

3. A wife may not maintain an action against the husband for a tort occurring after entry of an interlocutory decree but before entry of the final decree, since the interlocutory decree does not sever the marital bonds and the relationship of husband and wife exists until the final decree is entered. (*Paulus v. Bauder*, 106 Cal. App. 2d 422, 235 P. 2d 422.)

4. The marriage of either party contracted within one year after the entry of an interlocu-

tory decree is void. (California Civil Code, Section 61.)

(See also the many other cases cited in West's Annotated Cases to California Civil Code, Sec. 131, Note 4.)

All courts (Circuit Courts, District Court, and Tax Court) which had to pass on this issue have uniformly held that the term "decree of divorce" in Section 51 refers to a final decree which fixes the status of the parties as divorced. An interlocutory decree is not a decree of divorce; it is an inconclusive order; it does not dissolve the marriage; and it does not warrant a serious change of tax consequences.⁵ We have also shown that in view of the applicable California law, the reasoning of the *Eccles* and *Evans* cases is squarely in point in the case at bar.

B. An Interlocutory Decree of Divorce Is Not Equivalent to a Decree of Separate Maintenance.

The *Eccles* and *Evans* cases have also held that an interlocutory decree of divorce is not equivalent to a decree of separate maintenance under the law of Utah and Colorado respectively. The same applies

⁵The Government itself argued successfully that an interlocutory decree does not dissolve the marriage bonds in California, and that therefore salary earned by the husband between the granting of the interlocutory decree and the entry of the final decree is community property, one-half of which is taxable to the wife. The Tax Court upheld this view. (*Ethel B. Dunn*, 3 T.C. 319.) If the marital bonds still exist during the interlocutory period, so as to treat the husband's earnings as community property, then we fail to see how the Government can object to the right of the spouses to file a joint return.

to California and here are some of the many authorities in support of this statement:

1. In a divorce action the domicile of the parties is a jurisdictional requirement. Domicile however is not necessary for a separate maintenance action. Therefore, even a nonresident may maintain in California an action for separate maintenance. (*Wynne v. Wynne*, 20 Cal. App. 2d 131, 66 P. 2d 467.)

2. For a divorce action it is essential that plaintiff must have been a resident of the State for one year, and of the county in which the action is brought for 3 months prior to commencement of the action. (California Civil Code, Section 128.) The residence of plaintiff however need not be alleged or proved in an action for separate maintenance. (*Mattson v. Mattson*, 181 Cal. 44, 183 P. 443.)

3. The purpose of an action for separate maintenance is rather well stated in *Johnson v. Johnson*, 33 Cal. App. 93, 164 P. 421, at pages 96:

“The purpose of a suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payment be made at regular intervals for the wife’s support.”

(See also *Monroe v. Superior Court*, 22 Cal. 2d 427, 170 P. 2d 473; 16 Cal. Jur. 2d 516.)

In our case it is stipulated that “neither alimony, nor support or maintenance, nor any payment what-

soever'' was awarded by the interlocutory decree to the wife. Since the sole purpose of a decree for separate maintenance is to regulate the husband's support duty, such a decree granted to the wife must award her support payments to be made at regular intervals. Since in our case the decree does not contain any provision for any such payment, the interlocutory decree involved cannot possibly be a decree of separate maintenance under California law.

III. REBUTTAL OF POINTS RAISED BY APPELLANT IN ITS BRIEF.

Appellant fails to come to grips with the reasoning of the *Eccles* and *Evans* cases upholding appellees' view, and argues without citing any authorities, that long standing administrative construction of the applicable sections, as well as congressional intent support appellant's view. We will show that this statement is not correct.

1. Administrative Construction of Applicable Code Sections.

In its own Regulations (Reg. 111, para. 29.22(k)-1, see Appendix to this brief) appellant, in interpreting Section 22(k) employed the term "final decree" of divorce. The Tax Court in the *Eccles* case (p. 1053) in referring to these regulations observed that the Government "has made it plain that a decree of divorce refers to a final decree and the word 'final' is hardly used inadvertently, for these regulations repeat its use several times".

Reg. Sec. 29.51-1 (see appendix) state “A husband and wife occupying the marital status as of the last day of the taxable year may elect to make a joint return . . . However . . . an individual legally separated from his spouse under a decree of separate maintenance shall not be considered as married.” It is obvious that the marital status is determined by state law. We have shown that under California law which controls, appellees occupied the marital status of husband and wife on December 31, 1951, and that they were not legally separated under a decree of separate maintenance on that date. Thus under appellant’s own regulations appellees were entitled to file a joint return.

Appellant refers in the *Ostler* brief (p. 10) to a series of rulings on the issue involved. We will show that these rulings are far from consistent.

Soon after the promulgation of the regulations the Commissioner, in I.T. 3761, after remarking that under California law permanent alimony could be ordered by an interlocutory decree, ruled broadly that periodic payments made pursuant to an interlocutory decree of California were deductible by the husband and taxable to the wife.⁶ This ruling, which was contrary to the language of the regulations, evidently caused some confusion. In 1949, by I.T. 3934,⁷ the earlier I.T. 3761 was modified to provide that where the interlocutory decree provided for tempo-

⁶1945 Cum. Bull. 76.

⁷1949-1 Cum. Bull. 54.

rary alimony during the interlocutory period the temporary alimony was not deductible by the husband or taxable to the wife. Sometime later the Commissioner issued still another I.T. on the subject, I.T. 3944.⁸ In this I.T., it was stated that I.T. 3934 did not conflict with I.T. 3761 since periodic payments for the period of the interlocutory decree were not "periodic payments" within the meaning of Sections 22(k) or 23(u) and the modification of I.T. 3761 had been unnecessary.

The above demonstrates that such administrative interpretation of the applicable code sections which exist outside the regulations are confusing and irresolute, and we cannot agree with appellant that the above line of rulings shows "a consistent and long standing administrative construction" consistent with its view. Only the regulations speak in terms of the final decree and have never been altered. The regulations are not only harmonious with common parlance and established legal interpretation, but lay down the only rule which is consistent with the existing court decisions and, as we will show, with congressional intent.

2. Congressional Intent.

Appellant's brief states that congressional intent supports its view. It cites no authority for this statement except certain language found in the Senate Reports accompanying the 1948 Revenue Act which language was set forth verbatim in the *Eccles* case

⁸1949-1 Cum. Bull. 56.

and with regard to which the Tax Court stated (on page 105):

“This language can hardly be regarded as a congressional directive regarding interlocutory decrees . . . The uniformity of construction requested by Congress in the language quoted above and supported by the respondent in the regulations mentioned, will receive no injury by our holding here.”

Since appellant refers to congressional intent, we would like to call the attention of this Court to the following facts which clearly show that the *Eccles* case correctly interpreted the congressional intent on the issue involved:

The Hon. Eugene D. Millikin, Chairman of the Senate Finance Committee, on bringing H. R. 8300 (the bill containing the 1954 Revenue Code) to the Senate floor for debate, made the following statement (June 28, 1954, 100 Cong. Record 8536):

“H. R. 8300 is the culmination of studies on tax revision extending over a period of nearly 2½ years . . .

“I believe this bill has had the most thorough study and analysis of any tax bill ever presented to the Congress . . .”

This thorough study is also borne out by the fact that the official report of the Senate Finance Committee which accompanied the bill contained the record number of 628 printed pages.

The above indicates that Congress fully discussed the sections contained in the 1954 Revenue Code. On

page 248 of the Senate Finance Committee Report there are discussed (on an issue with which we are not concerned) the following cases: *Commissioner v. Fannie Hirshon Trust* (C.A. 2d May 17, 1954) and *Commissioner v. Estate of Ida S. Godley* (C.A. 3d May 28, 1954). This shows that Congress in enacting the 1954 Revenue Code was fully familiar with the judicial interpretations given to the various Code Sections and considered decisions rendered as late as May, 1954. If Congress did not like certain judicial interpretations the law was changed.

The issue before this Court was decided by the Tax Court in the *Eccles* case on March 11, 1953 and affirmed by the 4th Circuit Court on December 9, 1953. The *Evans* case was decided by the Tax Court in March, 1953 and affirmed by the 10th Circuit Court on March 13, 1954. Thus Congress was fully familiar with the interpretation unanimously given by the courts to Section 51 of the Internal Revenue Code. Yet the identical language of Section 51 of the 1939 Code has been incorporated by the 1954 Revenue Code in Section 6013(d)(2), which reads:

“An individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.”

If Congress had meant to include “interlocutory decree” in this new section, it could easily have done so. The fact that it adopted the identical language in the 1954 Revenue Code as contained in Section 51 of the 1939 Code clearly indicates that Congress

was in full accord with the judicial interpretation of Section 51.

CONCLUSION.

In view of the foregoing, we urge that the decision of the District Court be affirmed.

Dated, San Francisco, California,
May 28, 1956.

Respectfully submitted,
BRONSON, BRONSON & MCKINNON,
MAX WEINGARTEN,
Counsel for Appellees.

(Appendix A Follows.)

Appendix.

Appendix A

STATUTE AND REGULATIONS INVOLVED.

Internal Revenue Code of 1939

Section 22. Gross Income.

(k) Alimony, Etc., Income. In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *

* * * * *

Section 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(u) Alimony, Etc., Payments. In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to

be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

Section 51. Individual Returns.

(b) Husband and Wife.

(1) In General. A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * * *

(5) Determination of status. For the purposes of this section—

(A) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined—

(i) if both have the same taxable year—as of the close of such year; and

(ii) if one dies before the close of the taxable year of the other—as of the time of such death; and

(B) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

* * * * *

Treasury Regulations, promulgated under the Internal Revenue Code:

Section 29.22(k)-1. Alimony and separate maintenance payments—Income to former wife. (a) *In general.* * * *

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

The purpose and effect of section 22(k) may be illustrated, in general, by the following examples, in which it is assumed that the husband and wife make their income tax returns on the calendar year basis:

Example (1). W sues H for divorce in 1942. The court awards W temporary alimony of \$25 a week pending *the final decree*. On September 1, 1942, the court grants W a divorce and awards her \$200 a month permanent alimony. No part of the \$25 a week temporary alimony received prior to the decree is includible in W's income under section 22(k), but the \$200 a month received during the balance of 1942 by W is includible in her income for 1942. Under section 23(u), H is entitled to deduct such \$200 payments from his income.

Example (2). W files suit for divorce from H. In consideration of W's promise to relinquish all marital rights and not to make public H's financial affairs, H makes a legally binding promise in writing to W to pay to her \$200 a month if *a final decree* of divorce is granted without any provision for alimony. Accordingly, W does not request alimony and no provision for alimony is made under a final decree of divorce entered prior to 1942. During 1942, H pays W \$200 a month, pursuant to the promise. The \$2,400 thus received by W is includible in her gross income under the provisions of section 22(k). Under section 23(u), H is entitled to a deduction of \$2,400 from his gross income.

* * * * *

Section 29.51-1. Individual returns.

(b) Joint return—(1) *In general.* For taxable years beginning prior to January 1, 1944, a husband and wife, if living together at the close of the taxable year, may elect to make a joint return (see section 51(b)) even though one has no gross income. For taxable years beginning after December 31, 1943, *a husband and wife occupying the marital status as of the last day of the taxable year may elect to make a joint return* even though one of the spouses has no gross income or deductions, and even though the spouses are not living together at any time during the taxable year. *However, for the purpose of filing a joint return for taxable years with respect to which the amendments made to section 51(b) by section 303 of the Revenue Act of 1948 are applicable (taxable years beginning after December 31, 1947, and taxable years of both husband and wife beginning on the same day in 1947 if at least one of such taxable years ends in 1948), an individual legally separated from his spouse under a decree of separate maintenance shall not be considered as married.*

